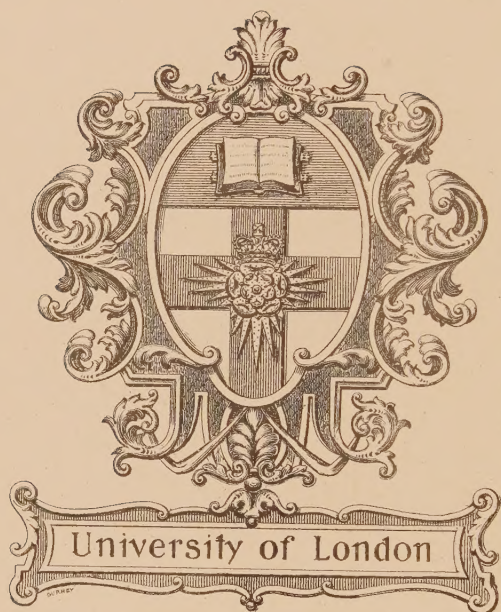


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THE
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LAW REPORTS
ANNOTATED

OF CASES DECIDED IN
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CORRIGENDA.

- P. 132. *Re* SYKES, YOUNGHOUSE v. SYKES. S. F. Miller, Mathews & Co. were the sole solicitors for the appellants.
- P. 167. *Re* ORAM, ORAM v. ORAM. The first word on this page should be "second."
- P. 245. *Re* BALL, LUCAS v. BALL. In the second line of the headnote, read "£200 per annum for life" and similarly on p. 246 at l. A.3.
- P. 449. *Re* BIKKER. At l. H.4 read "a covenant with the mortgagee by the person therein expressly charged."

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THE ALL ENGLAND LAW REPORTS ANNOTATED

Re HENDERSON'S CONVEYANCE.

[CHANCERY DIVISION (Farwell, J.), **July 8, 1940.**]

Real Property—Restrictive covenant—Discharge or modification—Covenant given in 1865 not to erect buildings on adjoining land—Private owners—Change in nature of property or neighbourhood—Law of Property Act, 1925 (c. 20), s. 84—E.S.C., Ord. 54D, rr. 1, 2, 3, 8.

In 1918, the appellant purchased a property consisting of a house and garden situated in a high-class residential district, together with the benefit of a covenant on the part of the owner of an adjoining property not to erect any buildings on the portion of that land which adjoined the appellant's garden. The restrictive covenant was given in 1865 on the purchase of the land from the then owner of the appellant's land. As a result of the covenant, the appellant enjoyed the benefit of an open space at the bottom of his garden and the benefit of not having the garden overlooked. In 1938, the respondent purchased the adjoining land together with another portion of the land with full notice of the restrictive covenant. He then desired to build upon the land subject to the restriction, although it was not suggested that it would not have been possible to build on the other portion of the land which he had acquired. He therefore applied under the Law of Property Act, 1925, s. 84, to have the restriction on building on this portion of the land removed. It was found as a fact that since 1865 there had been no change in the character of the property or of the neighbourhood:—

HELD: the respondent had failed to satisfy the requirements of the section and was not entitled to the discharge or modification of the restrictive covenant. The section is not primarily designed to benefit one private owner at the expense of another private owner. If relief is to be given to the covenantor, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the purchaser who is enjoying the benefit of it, and this fact the respondent had failed to prove.

[EDITORIAL NOTE.] The Law of Property Act, 1925, s. 84, provides for the modification of restrictive covenants where they have ceased to serve the purpose for which they were imposed. In the present case, the modification is refused because the owner of the land subject to the covenants could quite well erect the house upon his property, the only effect of the covenants being that he would have to place the house in a position different from that which he desired. As he had bought the property with notice of the restrictions, this is held to be an insufficient reason for the modification of the covenants.

AS TO MODIFICATION OF RESTRICTIVE COVENANTS, see HALSBURY, *Hailsham Edn.*, Vol. 29, pp. 452-454, para. 660; and FOR CASES, see DIGEST, *Supp.*, *Sale of Land*, Nos. 2807a-2807e.]

APPEAL from an award of the Official Arbitrator, dated Feb. 19, 1940, under the Law of Property Act, 1925, s. 84. The facts are fully stated in the judgment.

H. B. Vaisey, K.C., and *H. Heathcote-Williams* for the appellant, the respondent to the application.

G. D. Squibb for the respondent.

A

FARWELL, J.: Under the Law of Property Act, 1925, s. 84, the authority, which is therein defined, shall :

... (without prejudice to any concurrent jurisdiction of the court) have power from time to time, on the application of any person interested in any freehold land affected by any restriction arising under covenant or otherwise as to the user thereof or the building thereon, by order wholly or partially to discharge or modify any such restriction (subject or not to the payment by the applicant of compensation to any person suffering loss in consequence of the order) on being satisfied (a) that by reason of changes in the character of the property or the neighbourhood or other circumstances of the case which the authority may deem material, the restriction ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land for public or private purposes without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user . . . (c) that the proposed discharge or modification will not injure the persons entitled to the benefit of the restriction . . .

B

C

Then there is a proviso with regard to the compensation to be payable. Subject. (2) provides as follows :

The court shall have power on the application of any person interested (a) To declare whether or not in any particular case any freehold land is affected by a restriction imposed by any instrument ; or (b) To declare what, upon the true construction of any instrument purporting to impose a restriction, is the nature and extent of the restriction thereby imposed and whether the same is enforceable and if so by whom.

D

Then subject. (4) provides for rules being made. In subject. (10) the authority is defined as follows :

E

In this section " the authority " means such one or more of the official arbitrators appointed for the purposes of the Acquisition of Land (Assessment of Compensation) Act, 1919, as may be selected by the reference committee under that Act.

There have been certain rules made in respect of that section of the Act, to which I may perhaps refer. R.S.C., Ord. 54D, r. 1, provides that there shall be a right of appeal from an award of this sort, while r. 2 provides as follows :

F

Every appeal from the Minister under that Act shall be instituted in the Chancery Division of the High Court of Justice by originating notice of motion and shall be heard and determined by a single judge nominated from time to time either generally or in any particular instance by the Lord Chancellor.

G

Under that rule, I am the judge who is nominated to deal with these matters. Rule 3 provides as follows :

There shall be a right of appeal from (a) any order under the Law of Property Act, 1925, s. 84 . . .

H

Rule 8 provides as follows :

The determination of every appeal under this order shall be final unless leave to appeal is given by the court determining the same or the Court of Appeal.

There are other rules to which I need not refer.

The position of this court in dealing with these matters is that it is rehearing the matter to a very large extent. Under the rules, if the court thought it necessary, it could require witnesses to attend and give oral evidence. Generally speaking, the matter is dealt with upon such facts as were brought to the attention of the Official Arbitrator. In considering his award, the court has in mind that the Official Arbitrator is a person who has particular knowledge of the sort of matters which are dealt with under this section, and the court would be slow, I think, to interfere with the decision which the Official Arbitrator had reached, unless it was satisfied that he had not given a proper consideration to certain material facts, or had omitted to consider material facts, or had misunderstood the function which he had to fulfil, or had misconstrued the section of the Act. Generally speaking, so far as any technical question is concerned, the court would be very slow to interfere with the award of the Official Arbitrator. However, the court has power to make such order as it thinks fit if the Official Arbitrator has come to a conclusion with which it is not prepared to agree.

In the present case, in 1938, the respondent purchased a piece of land close to Wimbledon Common. On this piece of land there was originally a house known as Somerset Lodge. It was a house of some size, and the site included a piece of ground which had been used as a garden. The piece of land extended for some distance, and a portion of it abutted immediately upon the property of the appellant, who purchased his property—which is a house of very considerable size, the grounds of which abut immediately upon a road known as Parkside, on the opposite side of which stretches Wimbledon Common—as long ago as 1918. The appellant's property runs from Parkside towards Bathgate Road and Seymour Road. The house is at the end nearest Parkside. It is a house of considerable size, with a narrow but very attractive garden, which apparently has some fine trees in it. There is a bathing-pool and a tennis court, and, in addition, the appellant has expended considerable time and money in making a very attractive garden of alpine flowers. He has apparently made rather a speciality of alpine plants, and there are many in his garden which are somewhat rare and, as he thinks, of a somewhat interesting nature. At the end of the garden furthest from Parkside, there comes the piece of land which is included in the respondent's property. Judging by the photographs, that piece of land is apparently rather a wild piece of garden, sloping upwards. No doubt it gives a pleasant vista from the appellant's house and garden, and, so long as it is not built upon, prevents the appellant's garden from being overlooked.

The position is this. The appellant purchased his property in 1918, from the executors of William Williams, a well-known solicitor, who lived there for many years, and whose widow after his death continued to reside there. Finally, after the widow's death, the trustees, with the consent of the executors, sold the property to the present appellant. I

should add that, prior to, and at the time of, the sale to the appellant, the same persons owned the land which is now the property of the respondent, but the house, Somerset Lodge, was let by Williams on a 21-years' lease, with an option to purchase. That option was exercised, and the piece of land in question and the house were purchased by the predecessors of the respondent. The house itself is no longer there. It has been pulled down, and two smaller houses have been erected, but on a different part of the property. At the time, and certainly until the sale of Somerset Lodge and the land belonging to it, William Williams, the predecessor of the appellant, was the owner of that portion of the land as well as the owner of the land which is now the property of the appellant. A B

When the appellant purchased this property, it was conveyed to him by a conveyance of Dec. 20, 1918, made between the trustees and the executors under the will and the appellant. The conveyance recited the will of William Williams and his death, and that at the time of his death he was : C

... seised of the hereditaments hereinafter described for an estate of fee simple in possession subject to certain covenants and provisions restrictive of the user of that part of the said hereditaments coloured blue on the plan . . .

The operative part of the conveyance is as follows : D

In pursuance of the said agreement and in consideration of the sum of £5,500 now paid by the purchaser to the vendors as such trustees as aforesaid (the receipt of which sum the vendors hereby acknowledge) the vendors as trustees hereby convey unto the purchaser all those pieces of land situate in the parish of Wimbledon in the county of Surrey containing in the whole 3 acres 3 roods or thereabouts formerly part of the Wimbledon Park estate together with the messuage and buildings thereon known as Parkside and more particularly delineated on the plan drawn on these presents and thereon coloured pink and blue and together with the benefit of the covenants by Joseph Wright against building and other covenants contained in an indenture dated Mar. 25, 1865, and made between the said Joseph Wright of the one part and the said William Williams of the other part to hold unto and to the use of the purchaser in fee simple . . . E

By that conveyance, the appellant became the owner in fee simple of this piece of land—the house being now known as Lincoln House—and the house and garden adjoining thereto, together with the benefit of a covenant which was contained in the deed of Mar. 25, 1865. It is necessary, therefore, to look at that deed to see exactly what the covenants are. It is made between Joseph Wright of the one part and William Williams of the other part, and recites the lease of Somerset Lodge : F G

... together with the stables coachhouse and outbuildings thereto adjoining then lately erected by the said William Williams on a plot of ground situate in Somerset Road Wimbledon Park in the county of Surrey together with the gardens and piece of meadow or pasture ground . . . H

Then it recites as follows :

... it was agreed and declared between and by the parties thereto that if the said Joseph Wright his executors administrators or assigns should on or at any time before Feb. 25, 1865, give notice in writing signed by him or them to the vendor of the exercise of the option, he should have the right to purchase it for the

price therein named, and in further consideration of the covenant which is contained in the deed.

The covenant states that the purchaser :

... doth hereby for himself his heirs executors administrators and assigns covenant with the said William Williams his heirs executors administrators and assigns in manner following that is to say that he the said Joseph Wright his heirs or assigns will not at any time hereafter without the consent in writing under the hand or hands of the said William Williams his heirs or assigns being the owner or owners for the time being of the messuage or tenement called Parkside together with the land belonging thereto shown on the said plan drawn on these presents erect or build any erection or building whatsoever upon so much and such part of the piece of land or ground demised by the hereinbefore recited indenture of lease and so purchased as aforesaid as lies between the two lines hereinafter referred to.

- A Those lines are shown on the plan. The piece of land upon which that restriction was imposed abutted immediately upon the appellant's garden, between the end of his garden furthest from Parkside and New Park Road. That covenant, which was entered into in 1865, has been observed ever since, with the result that William Williams and his widow have, and after them the appellant has, had the advantage which was to be gained from the existence of that covenant—namely, that there was at the bottom of the appellant's garden a space which was not built upon, and which not only extended the view from the garden and the house, but also prevented anyone from overlooking the garden of the appellant.

- In 1938, the respondent purchased that piece of land, together with another portion of land. Having bought it, he desired to erect a house upon that portion of the land which is subject to the restrictive covenant. It is not suggested that it is not possible for him to erect a house upon the land which he has acquired so as to avoid that piece of land which is subject to the restrictive covenant, but it is said that he does not desire to erect his house there, because it would be in close proximity to the two smaller houses which have been erected, and that, therefore, it is not a desirable site, and, in his view, the proper position for a house to be erected on his piece of land is upon this portion of it which is subject to the restriction. When the appellant heard what the respondent's desire was, he offered to purchase the piece of land from him at a considerable profit, but the respondent was not prepared to entertain any such proposal. However, he had bought his property with full notice of the restrictive covenant, and it is not suggested that he was not fully aware of it at the time when he purchased. Therefore, he was unable to erect his house where he desired to erect it unless he could get the covenant affecting that portion of the land removed under the section of the Act.
- H The appellant opposed the application before the Official Arbitrator on the ground that it was not a case in which the restriction ought to be modified or removed. The Official Arbitrator has come to the conclusion that it is a case where the respondent is entitled to have the covenant removed, or, at any rate, modified :

... to the extent of permitting the erection on a portion of that part of the

aforesaid land tinted light green on the aforesaid plan of a private dwelling-house with garage accommodation for the use of the occupier of the said dwelling-house, such dwelling-house to be of a height to the ridge of the roof of not exceeding 40 ft.

He further came to the conclusion that the appellant in this court was entitled to compensation in the sum of £500 for the removal or modification of the covenant. Accordingly, the applicant, the respondent here, was ordered to pay £500, together with a sum in respect of costs. A

That award having been made, the appellant here gave notice of appeal. The notice of appeal states as follows :

. . . that the grounds of this appeal are : (1) That there are no changes in the character of the property or the neighbourhood or other circumstances of the case which should have been deemed by the said authority as material, by reason whereof the said restrictions ought to be deemed obsolete. (2) That the continued existence of the said restrictions unmodified does not impede the reasonable user of the said land for public or private purposes without securing practical benefits to other persons . . . (4) That the proposed modification will seriously injure [the appellant] being the person entitled to the benefit of the said restrictions by interfering with the amenities of his property for the benefit and protection of which the said restrictions were imposed and are still necessary. (5) That having regard to the nature and history of the said restrictions and the circumstances and date of the acquisition of the said land by [the respondent] the case is not one where any modification of the said restrictions ought to be ordered. B C

That notice of appeal having been given, the respondent in this case also served notice of appeal, but his notice of appeal was out of time. I am asked, notwithstanding that the notice of appeal was out of time, to entertain that appeal. The respondent is appealing against so much of the award as awarded £500 as compensation to the appellant, on the ground that the appellant is not a person suffering loss in consequence thereof. His contention is that, although the Official Arbitrator came to the right conclusion so far as the modification of the covenant is concerned, he ought not to have given the appellant any sum by way of compensation. In those circumstances, I have to consider whether or not the award of the Official Arbitrator is true. It is noticeable that the application in this case is not quite of the usual order. Most of the cases under this section are cases in which there are in existence restrictive covenants which are likely to, or actually do, impede or prevent the proper development of adjoining property. In most cases, they are covenants which, having regard to the present times and the changes which are required from time to time in the use of property, have become obsolete, or are of such a hampering nature that they really prevent any proper development of the adjoining property. In cases of that sort, the court has to consider whether the restrictions are such as can be properly and justly modified or released, or whether there is a real necessity, in order to enable the neighbouring property to be developed in a proper way, that there should be some modification or removal of the restrictions in question. However, this is not a case of that sort. This is purely a question between two private owners, one of whom desires to erect a house on a particular portion of his property while the other desires to keep that which he has long enjoyed, and that for which, presumably, he paid when he acquired his house D E F G H

and grounds, an open space at the bottom of his garden, so that his garden cannot be overlooked. It is not really a case where the applicant before the Official Arbitrator is seeking to develop his neighbouring land for some purpose such as erecting small houses or shops thereon. It is a question of whether the personal benefit which may result to him from

A being able to put his house on a particular part of his property will be sufficient to justify him in asking that the benefits under the covenant which the appellant has long enjoyed should be taken away from him.

Speaking for myself, I do not view this section of the Act as a section designed to enable a person to expropriate the private rights

B of another. I am not saying that there may not be cases where it would be right to remove or modify a restriction against the will of the person who has the benefit of that restriction, either with or without compensation, in a case where it seems necessary to release the restriction because it does prevent in some way the proper development of the neighbouring

C property, or for some such reason of that kind. In my judgment, however, this section of the Act was not designed—at any rate, *prima facie*—to enable one owner to get a benefit by being free of the restrictions imposed upon his property in favour of a neighbouring owner, merely because, in the view of the person who desires the restriction to go, it

D will make his property more enjoyable or more convenient for his own private purposes. If a case is to be made out under this section, there must be some proper evidence that the restriction is no longer necessary for any reasonable purpose of the purchaser who is enjoying the benefit of it. There may be some variation of the restriction by

E reason of a change in the character of the property or the neighbourhood, such as that the existence of that restriction is one which ought to go because the requirements of the neighbourhood make it proper that there should no longer be any such restriction in existence.

In the present case, the respondent has bought this piece of land

F with full notice that he was under a restriction against building on a particular portion of it. It is not suggested that it is impossible to build a house upon a portion of the land which he has acquired without in any way interfering with the restrictions upon this particular portion of the land he has bought. Therefore, it seems to me that the applicant

G before the Official Arbitrator must bring himself very strictly within the terms of the Act if he is to show a case which will justify the release or the modification of this covenant. If one turns to the Act, it is apparent what he has to show. He has to show that, by reason of changes in the character of the property, the restriction ought to be

H modified. In the present case, it does not seem to me that there has been any change in the character of the property. The property has been for many years a house occupied as a private residence, with a considerable garden of an attractive nature, and with the benefit of an open space at the foot of the garden over this particular portion of land, and, although the appellant is not at the moment actually living

at the house—I think it has been occupied by refugees, it having been left by the owner for that purpose, though he is proposing to take up his residence there again very shortly—the character of the property has been completely unchanged, so far as I can see, for many years—during all the time that William Williams himself lived there, during the time his widow lived there, and since 1918, since when the appellant A has lived there. There is nothing whatever in the evidence to suggest that there has been any change in the character of the property.

The next requirement which the Act imposes is that there should be “changes in the character of . . . the neighbourhood.” No doubt in Wimbledon Common, as in many other places, there has been, and still B is, a tendency no longer to make use of the somewhat large private houses which one finds there, but to erect smaller houses in place of the larger houses. However, there is nothing whatever to suggest that the neighbourhood is not still a high-class residential neighbourhood. No doubt the size of the houses is smaller, and, where there was formerly C one large house, there may now be two small houses, but that the character of the neighbourhood has altered does not seem to me to be proved in any degree at all, so far, at any rate, as the immediate neighbourhood of this house is concerned. As far as I can see from looking at the maps to which my attention has been called, the character of the D neighbourhood remains the same—namely, that of a high-class residential neighbourhood. The applicant before the Official Arbitrator did not satisfy the first requirements of this section, because he did not succeed in proving a change in the character either of the property or of the neighbourhood. E

Then the section provides: “or other circumstances of the case which the authority may deem material.” What other circumstances there could be in this case I do not really appreciate. Certainly it was suggested before the Official Arbitrator that there had been a change in the neighbourhood, but the fact that there were any other circumstances does not seem to me to have been proved at all. Then the section continues, still referring to the restriction: F

. . . or that the continued existence thereof would impede the reasonable user of the land for public or private purposes.

The continued existence of this restriction clearly will not impede the G reasonable user of the land for public purposes, because it is not suggested that the respondent is intending, or ever has intended, to use his land for public purposes. His object, and his only object, as far as the evidence shows, was to buy this portion of land for the purpose of erecting a dwelling-house upon it. Therefore, as far as it can H be said that this was to impede the reasonable user of the land for public purposes, there is no evidence at all. Then the next words are words which might be important: “or private purposes.” There is no doubt that the erection of a dwelling-house in a case of this sort is for private purposes, and no doubt the existence of this restriction will impede,

and does impede, the erection of the respondent's house upon the particular part of the property upon which he desires to put it. Nevertheless, the continued existence of the restriction does not in any way impede the erection of a house upon the piece of the land which the respondent bought.

A Then the section proceeds :

without securing practical benefits to other persons, or, as the case may be, would unless modified so impede such user . . .

It is said that the appellant here is getting no practical benefit from the enjoyment of this covenant. In my judgment, that is not so. In my

B view, it is a practical benefit to the owner of property to have an open space, and a space which must be kept an open space, in the immediate neighbourhood of his property. Apparently, when William Williams imposed this covenant on the purchaser of the adjoining land, he thought that there was a benefit in taking the covenant which he did take. In

C my view, if there was a practical benefit in getting an open space in 1865, there is an even greater practical benefit in securing an open space in these days, when the number of open spaces in the immediate vicinity of London is rapidly becoming less. Moreover, I think that there is a practical benefit in having a garden which is not overlooked

D by a house or houses immediately adjoining it. Here there is a bathing-pool and a tennis court. Although, no doubt, it is not a very valuable asset, it is a practical benefit, in my view, that persons can use a bathing-pool and play tennis on the tennis court without having someone watching their movements all the time. Although, as I say,

E that may not be of very great value, it is of some value to the owner of the property, and, in the case of his desiring to sell or let the property, it would be an amenity which might well enhance the value of the property as a whole.

It is said that, if and when the present appellant, either by reason F of his death or otherwise, is no longer in possession of this property, there is no likelihood of the property being occupied again by a private individual, and the probability is that it will be sold as building ground.

If and when the day comes when it is proposed to erect smaller houses on the land which is now the appellant's, it may then be reasonable enough G that this restriction should go. As long as the property is in the

ownership of the present owner and the adjoining property is the property of the respondent, this is simply an attempt to avoid the obligations of a covenant which were perfectly well known to the respondent when he bought his property, merely in order to enable him

H to get a benefit by erecting his house where he wants it erected, at the expense of the appellant, who is being made to give up what is, in my view, a benefit of some value, which he is entitled to enjoy unless the case is one in which the changes in the character of the neighbourhood or the property properly require that he should no longer have the right to enjoy those privileges.

In my judgment, the applicant before the Official Arbitrator failed to satisfy the requirements of the section, and, in my view, the Official Arbitrator should have come to the conclusion that there was no ground for modifying in any way the existing covenant the benefits of which the appellant in this court was enjoying, and that he should, therefore, have refused to make any award at all on the application. The true conclusion to reach in this case is to set aside the award and to order the respondent to pay the costs. A

Award set aside. Leave to appeal to the Court of Appeal.

Solicitors: *Lewis & Yglesias* (for the appellant); *E. P. Rugg & Co.* (for the respondent). B

[Reported by **IRENE G. R. MOSES**, Barrister-at-Law.]

Distinguished *Gillson* *Ch. 99*

Re SYKES, SKELTON AND DYSON v. SYKES. C

[CHANCERY DIVISION (Bennett, J.), **June 20, 1940.**]

Wills—Construction—Bequest to wife of “all my . . . horses”—Only horses those owned as tenant in common with wife—Admission of extrinsic evidence—No specific thing disposed of. D

A testator by his will gave to his wife, *inter alia*, “all my . . . horses.” At the date of his will and of his death he had no horses of his own, but was owner as tenant in common with his wife of 3 racehorses which he raced in partnership with her. He left a widow and residuary legatees, and it was contended on behalf of the former that the testator’s interest in these horses passed to her under the bequest. It was further contended that the extrinsic evidence that the testator owned no horses when he died must be looked at, and that this evidence showed that the bequest was wholly inoperative unless construed as extending to, and operating upon, the interest of the testator in the 3 horses:— E

HELD: the bequest of “all my . . . horses” did not operate to pass to the widow the testator’s interest in the 3 horses. Extrinsic evidence was not admissible to construe the bequest, since the testator was not intending to dispose of some specific thing but of things of the class described in the will of which he might die possessed. F

[EDITORIAL NOTE.] When the words of a will have no reasonable application to the circumstances proved extrinsic evidence is admissible to discover the meaning of the words which will give the will full effect. Before such evidence can be admitted, however, it must be shown, as a matter of construction of the will, that the testator intended to dispose of some specific thing, not merely, as in the present case, of a class of things of which he might die possessed. G

AS TO ADMISSION OF EXTRINSIC EVIDENCE TO EXPLAIN MEANING OF WORDS IN WILL, see HALSBURY, Hailsham Edn., Vol. 34, pp. 173, 174, para. 226; and FOR CASES, see DIGEST, Vol. 44, pp. 623, 624, Nos. 4531-4539.]

Cases referred to: H

- (1) *Re Glassington, Glassington v. Follett*, [1906] 2 Ch. 305; 44 Digest 624, 4538; 75 L.J.Ch. 670; 95 L.T. 100.
- (2) *Cochrane v. Moore* (1890), 25 Q.B.D. 57; 25 Digest 508, 47; 59 L.J.Q.B. 377; 63 L.T. 153.
- (3) *Le Farrant v. Spencer* (1748), 1 Ves. Sen. 97; 44 Digest 711, 5559; 24 L.J.Ch. 526, n.

- (4) *Re Seton-Smith, Burnard v. Waite*, [1902] 1 Ch. 717; 44 Digest 714, 5622; 71 L.J.Ch. 386; 86 L.T. 322.
 (5) *French v. Styring* (1857), 2 C.B.N.S. 357; 36 Digest 321, 40; 26 L.J.C.P. 181; 29 L.T.O.S. 127.
 (6) *Re Lowman, Devenish v. Pester*, [1895] 2 Ch. 348; 44 Digest 428, 2575; 64 L.J.Ch. 567; 72 L.T. 816.

A ADJOURNED SUMMONS for an order determining whether, on the true construction of the will of Edward Masgrave Sykes, the specific bequest in cl. 3 includes the testator's share and interest in 3 racehorses known respectively as Master Bimbo, Second Pop and Tetrasen.

B Wilfrid M. Hunt (for T. A. C. Burgess on war service) for the plaintiffs.
 Roger W. Turnbull for the defendant, the widow of the testator.
 E. M. Winterbotham for the residuary legatees.

Hunt stated the facts.

C Winterbotham: These 3 horses were not the testator's property, but the property of the partnership between the testator and his wife. The testator merely had an undivided share in them. He had a right to have the horses used for partnership purposes and a right to a share of any profits arising thereout; but an undivided share in horses is not a chattel and cannot pass under this specific bequest. [Counsel referred to *Re Glassington, Glassington v. Follett* (1), *Cochrane v. Moore* (2), *Le Farrant v. Spencer* (3) and *Re Seton-Smith, Burnard v. Waite* (4).]

D Turnbull: The testator possessed no other horses, either at the time of his will, or at the time of his death, to which these words could apply, and therefore these words are meaningless unless it is held that the bequest applies to these 3 horses. On the authority of *Re Glassington, Glassington v. Follett* (1) evidence is admissible to show that the testator had no other horses either at the time of the will or at that of his death. [Counsel also referred to *French v. Styring* (5) and *Re Lowman, Devenish v. Pester* (6).]

E Winterbotham in reply: Evidence is not admissible to show that the testator owned no other horses at the time of his death or of his will.

F BENNETT, J.: The testator made his will on May 11, 1939, and died on June 29, 1939. The bequest which has given rise to the question is as follows:

G I give to my wife Eileen Evelyn Sykes absolutely free of death duties all my household furniture clocks watches jewels trinkets personal ornaments and wearing apparel plate and plated articles linen china glass books manuscripts pictures drawings etchings engravings prints photographs musical instruments music pianolas pianola records articles of vertu wines liquors and consumable stores and provisions horses carts carriages motor cars carriage and motor accessories cycles harness saddlery coachhouse stable and garage furniture and utensils plants garden tools and implements and all other articles of personal domestic or household use or ornament.

H According to the evidence of the plaintiff Skelton, the testator and his wife

... owned as tenants in common in equal shares three racehorses, known respectively as Master Bimbo, Second Pop and Tetrasen. They raced these horses in

partnership as a hobby for profit. There was no written partnership agreement but the partnership in each horse was registered under the Rules of Racing with Messrs. Weatherby & Sons the agents to the stewards of the Jockey Club. At the death of the testator the partnership account with Messrs. Weatherby was in credit to the extent of £846 8s. Since the testator's death the said horses have been put up for sale by auction and two of them were sold for a total of £316. The third horse, Master Bimbo, was not sold, as the reserve of £750 was not reached. The last-named horse was valued for probate at £700 and it remains for sale. Since the death some expenses have been incurred in maintaining the horses and the expense of maintaining the said unsold horse will continue until it is sold. A

Since that affidavit was made, the testator's widow has put in evidence some further facts in regard to the 3 horses in an affidavit which she swore on June 17. In para. 3 of that affidavit, she says :

The facts in relation to the said three horses are as follows : (a) My husband for some years prior to my marriage to him owned racehorses. (b) We intermarried on Aug. 17, 1932. I shared the testator's liking for racing and after we had married we used often to go racing together. (c) In or about Sept., 1936, the testator said to me that in order to give me an additional interest in racing he proposed to register me as part-owner of his horses. (d) A copy of the Rules of Racing is now produced and shown to me . . . and they provide (by r. 94) that all partnerships and the name of every person having any interest in a horse and the relative proportions of such interest must be signed by all the parties or their authorised agents and lodged at the Registry Office [Messrs. Weatherby's office]. (e) Accordingly a partnership was registered with Messrs. Weatherby & Co. in respect of the three horses above referred to. [Copies of the forms registered are then exhibited.] Subsequently when accounts showing a credit balance came in from Messrs. Weatherby & Co. the testator used to say to me that he proposed to deduct from our winnings the sum named by him to recoup him for the trainers' bills and other expenses (which he always discharged) and he used to give me out of the balance a sum which would so far as I am aware be about 50 per cent. although there was never any question of strict accounting between us and I always accepted without demur whatever he chose to give me. When the accounts were in debit the testator always discharged them without asking for or obtaining any contribution by me. B

This is the usual arrangement in a case of domestic partnership. The forms show that these 3 horses, for the purposes of the Rules of Racing, were owned by the husband and wife in equal shares. Those were the facts, except for one further fact which has been deposed to—namely, that, apart from his interest in Master Bimbo, Second Pop and Tetrasen, the testator owned no other horse or horses of any description. C

In my judgment, *prima facie*, construing the words in their primary and ordinary sense, a bequest of "my horses" does not extend to, or include, the interest which a testator has as a tenant in common of a horse. That interest is not, on any ordinary interpretation, the testator's horse. It is merely a collection of rights in respect of a horse which one co-owner has against another co-owner. Upon the interpretation of the language of the will, the words "my horses," in my judgment, do not operate to pass to the defendant the testator's interest in those 3 horses. D

Then counsel for the defendant argues that I must look at the extrinsic evidence, and he says that, if I look at the extrinsic evidence, I shall find that the bequest of "all my . . . horses" is wholly inoperative unless I construe the words as extending to, and operating upon this interest which the testator had in them. In my judgment, the evidence is inadmissible. It is not admissible until, as a matter of construction of E

- the will, one concludes that the testator was intending to dispose of some specific thing. In a bequest like this, although it is truly described as a specific bequest, and is, in a sense, a specific bequest, the testator is not referring to some specific things of which he is the owner at the time when he is making his will. What he is intending to dispose of by a clause
- A such as cl. 3 of this will are things of the kind or class described in the clause which he possesses at the time of his death, that being the date at which the will speaks. Until one can arrive at the conclusion that a testator intended to dispose of something specific, in my judgment, upon what JOYCE, J., said in *Re Glassington, Glassington v. Follett* (1), citing
- B from WIGRAM ON EXTRINSIC EVIDENCE, at p. 313, the fact that the testator had no horses is inadmissible. In *Re Glassington, Glassington v. Follett* (1), the testatrix by her will devised and appointed all the real estate of or to which she should be seised or entitled, or over which she should have any power of disposition or appointment by will at the
- C time of her death, to trustees upon a number of trusts, management, and so forth, and then beneficial trusts in favour of her sister, and, after her death, upon trust for her sister's children. She had no real estate at all, but, under her father's will, she was entitled, during the life of his wife, who was alive, to a moiety of the annual produce, subject to the payment
- D of certain annuities then subsisting, of the proceeds of sale of certain freehold property devised by his will to his trustees upon trust for sale. JOYCE, J., first of all construed the will, and then said, at p. 311 :

- Upon a perusal of the will alone it is plain, at least to my mind, that the testatrix was intending to dispose of something referred to as real estate in favour of her sister and her sister's children subject to the husband's annuity, and that
- E she was intending to devise or dispose of something which she considered that she had, just as much as if she had said : " I give and devise my real estate," and so on, meaning thereby, or having in view, the real estate to which she considered herself to be then entitled.

- Having come to that conclusion upon the consideration of the will alone,
- F he deals with the question of what evidence is admissible, and says, at p. 313 :

- ... reading from Proposition 3 in WIGRAM ON EXTRINSIC EVIDENCE [3rd Edn., p. 42] ... " Where there is nothing in the context of a will, from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, but his words, so interpreted, are
- G insensible with reference to extrinsic circumstances, a court of law may look into the extrinsic circumstances of the case, to see whether the meaning of the words be sensible in any popular or secondary sense, of which, with reference to these circumstances, they are capable." Now here is a case in which, strictly speaking, the words of the gift are not sensible with respect to extrinsic circumstances. When I say that, of course I am assuming that I am right in what I said before as to the intention appearing upon the face of the will to dispose of something or other which the testatrix thought she had, and which she called " real estate."

- II I am unable to come to the conclusion that in this will the testator was intending to dispose of some specific things which he had when he penned his will. All I think he was intending to dispose of were things of the class or classes which are described in the will which he might own at the time of his death. On that interpretation of cl. 3, it does not

seem to me that the extrinsic fact that the testator had no horses when he died is admissible in evidence, and, for the reason that the rights which, as a co-owner, the testator had against his wife in respect of these 3 horses are not, in my judgment, "horses," I decide against the claim advanced by counsel for the defendant.

Solicitors: *Skelton & Co.*, Manchester (for the plaintiffs); *Charles Russell & Co.* (for the defendant); *S. F. Miller, Mathews & Co.* (for the residuary legatees).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

WODEHOUSE v. LEVY AND ANOTHER (ST. MARYLEBONE BOROUGH COUNCIL, THIRD PARTY).

[COURT OF APPEAL (MacKinnon, Luxmoore and Goddard, L.J.J.), July 29, 30, 1940.]

Emergency Legislation—Duty to light streets—Street refuge—Lighting restrictions—How far affecting obligation to light obstructions in street—Metropolis Management Act, 1855 (c. 120), ss. 108, 130—Lighting (Restrictions) Order, 1939 (S.R. & O., 1939, No. 1098), paras. 1, 4 (d). Highways—Obstructions—Lighting of obstructions—How far duty affected by lighting restrictions.

The plaintiff, while travelling in a taxicab during the hours of black-out on Sept. 1, 1939, was injured when the cab collided with an unilluminated bollard at the end of a refuge in a road within the district of the defendant local authority. The refuge was erected by the local authority under the powers conferred upon them by the Metropolis Management Act, 1855, s. 108. Under sect. 130 of the same Act, they are under an obligation to light the streets in their district. On Sept. 1, 1939, the Lighting (Restrictions) Order, 1939, came into force, but it contained a provision that it should not apply to (*inter alia*) lamps indicating obstructions upon the carriageway of a road, provided that they did not exceed one candlepower and were properly screened. It was contended on behalf of the local authority that this order negated the duty under the Metropolis Management Act, 1855, s. 130, to light the streets:—

HELD: as the Metropolis Management Act, 1855, s. 130, had, in effect, been temporarily repealed by the Lighting (Restrictions) Order, 1939, there was no statutory obligation on the part of a local authority to light an obstruction which it had placed in a street in pursuance of its statutory power under sect. 108 of the Act. Since the obstruction was placed in the highway in pursuance of statutory authority there was no common law duty to light it.

Decision of CASSELS, J. ([1940] 3 All E.R. 137) reversed.

[EDITORIAL NOTE.] The common law duty to light an obstruction in a highway applies only in the case of a nuisance. An obstruction erected under statutory authority cannot be a nuisance, and there is, therefore, no common law duty to light it. The statutory duty to light imposed by the Metropolis Management Act, 1855, s. 130, is a duty to light streets, but not particular objects therein, and, as has recently been held in *Greenwood v. Central Service Co., Ltd.* (1), that duty has been, in effect, temporarily suspended by the emergency order restricting lighting. The provisions of para. 4 (d) of the Lighting (Restrictions) Order, 1939, give a permission to, but do not place an obligation on, a local authority to light obstructions with lights of low candlepower.

AS TO LIGHTING OBSTRUCTIONS IN HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436; and FOR CASES, see DIGEST, Vol. 26, pp. 392 395, Nos. 1187-1212.]

Cases referred to :

- A (1) *Greenwood v. Central Service Co., Ltd. (St. Marylebone Borough Council, Third Parties)*, [1940] 3 All E.R. 389; Digest Supp.
- (2) *Great Central Ry. Co. v. Hewlett*, [1916] 2 A.C. 511; 26 Digest 419, 1383; 85 L.J.K.B. 1705; 115 L.T. 349; *revsg.*, 114 L.T. 713.
- (3) *Baldock v. Westminster City Council* (1918), 88 L.J.K.B. 502; 26 Digest 392, 1190; 120 L.T. 470.
- B (4) *Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E.R. 339; Digest Supp.; 158 L.T. 127.

APPEAL by the local authority from a judgment of CASSELS, J., dated Apr. 29, 1940, and reported [1940] 3 All E.R. 137. The facts are fully set out in the judgment of MACKINNON, L.J.

- C *S. R. Edgedale* for the appellants.
Montague L. Berryman for the first and second respondents.
N. R. Fox-Andrews and *R. E. Hopkins* for the third respondent.

D MACKINNON, L.J.: In this case, the plaintiff by his next friend brought an action originally against the owner of a taxicab and its driver. His case was that very late on the night of Sept. 1, 1939, or just after midnight on the night of Sept. 1-Sept. 2, 1939, he was being driven by the taxicab driver up the Finchley Road when the taxicab collided with an unlighted bollard on a refuge and he sustained injury.

E Subsequently, the St. Marylebone Borough Council were added as the second defendants, the plaintiff alleging that they were jointly responsible with the owner and driver of the taxicab on the ground that they had not lighted this obstruction in the highway. The individual defendants claimed contribution by the council if they should be held liable in

F damages. The case was heard by CASSELS, J., who decided that the defendant's driver was negligent, and also that the St. Marylebone Borough Council were liable because they had contributed to the disaster by failing to light this obstruction in the highway. He awarded a certain amount of damages to the plaintiff, and, as between the defendants, he

G allocated their shares of the blame, as to 25 per cent. to the taxicab owner and driver, and as to 75 per cent. to the St. Marylebone Borough Council. This appeal is brought by the St. Marylebone Borough Council. They contend that no judgment at all ought to have been entered against them, but, by an alternative contention, suggest that, even if they were liable,

H the distribution of the blame, as to 75 per cent. on them and as to 25 per cent. on the taxicab owner and the driver, was wrong. On that point, I need not say any more.

This case is very similar to one which was previously decided by this court—namely, *Greenwood v. Central Service Co., Ltd. (St. Marylebone Borough Council, Third Party)* (1), which was another case concerning

a passenger in a taxicab which had run into an unlighted bollard on a refuge in the defendant council's area. In that case, this court decided that there was no absolute obligation upon the borough council to light the refuge, because their only obligation to light the streets existed under the Metropolis Management Act, 1855, s. 130, and that section had been temporarily repealed by the Lighting (Restrictions) Order, 1939, A issued by the Home Office under emergency legislation forbidding the exhibition of any lights by anybody. Secondly, this court held that, if it were a question of using reasonable care, there was in fact, in the circumstances of that case, no lack of reasonable care on the part of the borough council in not lighting the refuge. They had in fact put a B temporary lamp on it, but the lamp had gone out, and it was held that there was no negligence in not relighting it at the time when the accident happened.

In this case, CASSELS, J., held that there was an absolute obligation upon the borough council to light this obstruction, and, in the course C of our judgments in *Greenwood's* case (1), we had this case brought to our notice, and indicated our disapproval of that part of the judgment of CASSELS, J. Of course, it was not open to counsel for the first and second respondents in this case to contend in this court that there was any absolute obligation to light, but he says that we held that there was an D obligation to use reasonable care to light an obstruction, and that, on the facts of this case, the borough council did not do so.

I have observed that in the reports of my judgment in *Greenwood's* case (1) there do occur the words [p. 391]:

No doubt, however, there would remain a common law obligation upon the E respondents, having erected an obstruction in the highway, to use reasonable care to prevent that obstruction from being a danger to persons using the highway.

I was delivering an oral judgment, and in the course of that judgment no doubt I did use those words, but I am quite satisfied that, if I had had the opportunity of revising my judgment, I should have altered that F passage and substituted some such words as these: "Though it is said that there was a common law obligation to use reasonable care, even if that be so, on the facts of this case, there was in fact no negligence." Having reconsidered the point, I think that that passage was wrong, because the borough council were given the right to erect this obstacle G in the highway by the Metropolis Management Act, 1855, s. 108, and, if there is any obligation to light it, that also must be found in some statute. In times of peace, that obligation exists under sect. 130 of the same Act, but, as has been pointed out, sect. 130 has now been temporarily repealed. In the absence of any provision similar to sect. 130, H the local authority being given by statute the right to erect the obstruction in the highway, I think that there is no statutory, and also no common law, duty to light it. That that is so is shown by two cases. The first is *Great Central Ry. Co. v. Hewlett* (2) and the second is the judgment of BANKES, L.J., in *Baldock v. Westminster City Council* (3).

In those circumstances, we have already indicated our disapproval of the judgment of CASSELS, J., on the point as to whether or not there was an absolute obligation to light this bollard. I think, in the circumstances, after due consideration, that there was no duty to light it arising under any rule of law, either statutory or common law. That
A being so, the judgment ought not to have been given against the borough council, and this appeal succeeds. I would also add that, in my view, even assuming that there was, as I meant to say in *Greenwood's* case (1), some duty to be derived under some rule of law to use reasonable care in lighting this obstruction, in the particular circumstances of this case
B I cannot make out that there was any lack of reasonable care on the part of the borough council. It was the very first night of the black-out, and their servants, or, at any rate, some of them, had been working for 24 hours on end. I need not pursue it further, because the point does not arise. If it did arise, I should come to the conclusion that no negli-
C gence on the part of the borough council or their employees had been established. For all these reasons, I think that this appeal succeeds and must be allowed with costs.

LUXMOORE, L.J.: I agree that this appeal should succeed. As
D MACKINNON, L.J., has pointed out, the questions raised in this case are very similar to those raised in *Greenwood's* case (1). In that case, as in the case now before the court, the main questions which arose were whether the St. Marylebone Borough Council were under any duty, statutory or otherwise, to place a light upon an obstruction forming
E part of the street refuge erected under the Metropolis Management Act, 1855, s. 108, and how far any such duty was affected by the Lighting (Restrictions) Order, 1939. In *Greenwood's* case (1), it was held by this court, following an earlier decision of the Court of Appeal (BANKES, WARRINGTON and SCRUTTON, L.JJ.) in *Baldock v. Westminster City*
F *Council* (3), that, though the council is under a duty with regard to lighting the streets under its jurisdiction by reason of the provisions of the Metropolis Management Act, 1855, s. 130, it is under no statutory duty to light an obstruction erected in such a street under the provisions of sect. 108, apart from its general duty, under sect. 130, to keep the
G streets within its district well and sufficiently lighted. There is no question that the St. Marylebone Borough Council had, long before the Lighting (Restrictions) Order, 1939, came into existence, fulfilled its duty under the Metropolis Management Act, 1855, s. 130, by providing a proper system of street lighting, and that it was maintaining that
H system properly immediately before the Lighting (Restrictions) Order, 1939, came into force. The order came into force on Sept. 1, 1939, and was promulgated, I understand, only a few hours before the happening of the accident which gave rise to the claim in this action. It is plain that this order absolves the borough council from any liability to keep the streets in its district well and sufficiently lighted under the Metropolis

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Management Act, 1855, s. 130, for para. 1 of the order provides as follows :

Subject as hereinafter provided, no person shall during the hours of darkness cause or permit [any light to be displayed].

I am reading that shortly, so far as it is applicable to the present case. The provisions of the order fully empower certain lights to be used, but these powers are permissive only, and do not affect the abrogation of the borough council's liability to keep its streets well and sufficiently lighted. We were told that there was no other statute affecting the question of lighting. That being the case, the question arises as to whether the borough council is under a common law obligation to light the obstruction in question.

As I pointed out in *Greenwood's* case (1), the obstruction was properly erected under statutory powers conferred by sect. 108 of the 1855 Act, and, therefore, it cannot be held to constitute a nuisance at common law, and, secondly, there cannot be any common law obligation with regard to it. In *Greenwood's* case (1), I referred to the opinions in *Great Central Ry. Co. v. Hewlett* (2) as affording ample authority for this view. It is true that MACKINNON, L.J., said in *Greenwood's* case (1), at p. 391, that there was a common law obligation, but it appears to me that that statement was due to the fact that he had momentarily overlooked *Great Central Ry. Co. v. Hewlett* (2), to which he had himself referred during the course of the argument. It is also worthy of note that no suggestion of common law obligation was mentioned in *Baldock v. Westminster City Council* (3). In that case, the council were held liable for not lighting an obstruction in a street under its jurisdiction because it had taken upon itself what BANKES, L.J., and I think the other members of the court, described as a self-imposed duty to keep the obstruction illuminated. It is true that in *Polkinghorn v. Lambeth Borough Council* (4) SCOTT, L.J., in his judgment spoke of the liability to illuminate a similar statutory obstruction as arising under the Metropolis Management Act, 1855, or the common law, and the passage which I quoted in my judgment in *Greenwood's* case (1) appears in *Polkinghorn's* case (4), at p. 343 :

In those circumstances, my view is that the legal position is a very simple one. It is that, whether one regards the case from the point of view of statutory duty or from the point of view of common law negligence, in either case the failure to maintain the light is all it is necessary for the plaintiff to prove, in order to establish his right to damages. . . .

In my judgment, if that means that, in his view, there is a common law obligation to light an obstruction of the nature referred to in this case, the decision is contrary to the decision in *Great Central Ry. Co. v. Hewlett* (2) and also to that in *Baldock's* case (3). Therefore, with the greatest respect to SCOTT, L.J., I should feel myself unable to follow him. The decision in *Polkinghorn's* case (4) is, of course, amply justified by the fact that the Lambeth Borough Council had become subject to a self-imposed duty to illuminate the particular obstruction, in the

same way as the Westminster City Council had become liable in *Baldock's* case (3).

In the present case, the St. Marylebone Borough Council had never, previous to the accident, illuminated the obstruction in question, and, therefore, had not become subject to any self-imposed duty to keep it illuminated. No question of negligence arises, but I feel bound to confess that, if it had been material to consider whether or not the borough council were guilty of any negligence, I should not have been able to agree with the finding of CASSELS, J., for I am satisfied that there was no evidence at all of its existence. For those reasons, I agree that this appeal must be allowed with costs.

GODDARD, L.J.: I agree. It may be that in some of the cases expressions have been used with regard to lighting obstructions which cause some little confusion. Parliament having authorised the local authority to put a refuge in the street, and not having imposed upon the authority the duty of putting a light on the obstruction itself, it follows that the local authority are committing no breach of statutory duty if they put a refuge in the street and do not put a light on that refuge. That, of course, in no way lessens the obligation of the borough council or other local authority to provide an adequate system of street lighting, and the system would not be adequate if it did not cause a reflection or light to show people where obstructions in the streets were. Thus, in peace time, when these refuges are in the streets, while there is no obligation on the council to put a beacon or lamp actually on the refuge, they must arrange their street lighting so that there will be enough light for passengers in the road to see, and thus to avoid, the obstructions which the council put there. They can do that by having high-power lamps on the pavement, or by slinging high-power lamps across the roadway, as is done on the Embankment, or they can, if they wish, put a light on the obstruction itself. Their obligation is only to provide an adequate system of street lighting, and, when there came into force the order which prevented their lighting the streets at all, it followed that their obligation to provide street lighting was not only gone, but was actually prohibited. I can find no duty on the council, after that regulation came into force, under which they were bound to light the obstruction, because, as MACKINNON and LUXMOORE, L.JJ., have pointed out, the provision in the order that the order does not apply to a certain class of lights is only permissive. It takes out of the prohibition and allows certain lights to be maintained which otherwise would be an offence, but it does not seem to me to increase the authority's obligation in any way. I cannot find any obligation to light a refuge, apart from the general obligation to provide an adequate system of street lighting. That became illegal, and it follows that the council committed no breach of their duty.

With regard to the other point to which MACKINNON and

LUXMOORE, L.JJ., have referred, it does seem that in the court below the council did not take up the attitude: "We could not do it." In fact, they went on to show what they did. Had they really relied upon the defence that they had taken every adequate step (it may be that they did, because they suggested that these lamps might have been stolen), I myself should have found it exceedingly difficult to find, and I do not think that I should have found that, in the circumstances, they were negligent. The Borough of St. Marylebone must have hundreds, if not thousands, of refuges. In desiring to give the public the largest possible measure of protection by putting hurricane lamps on these refuges, they seem to me to have acted with admirable foresight and promptitude, but, if through the course of the afternoon between 4.30 p.m. and midnight one refuge was overlooked, even if they had been under a duty to light it—which they were not—I should have found great difficulty in saying that it was negligence to have overlooked that one refuge on that day, although, if they had been under a duty to light it and it had been left unlighted for two or three days, different considerations might have arisen. Having read the evidence in this case, I think that I should have come to the view that they did in fact light this refuge, but that some evilly-disposed person removed the light. However, I need not go into that further, because I agree that there was no obligation to light. I agree that the appeal should be allowed.

Appeal allowed with costs.

Solicitors: *William Charles Crocker* (for the appellants); *A. D. Vandamm & Co.* (for the first and second respondents); *F. J. Stewart* (for the third respondent).

[Reported by DEREK H. KITCHIN, ESQ., *Barrister-at-Law.*]

UNITED AUSTRALIA, LTD. v. BARCLAYS BANK, LTD. F

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Romer and Lord Porter), **May 28, 29, June 3, August 20, 1940.**]

Tort—Waiver—Action on same facts based on contract—Action not proceeding to judgment—Subsequent action against bank for conversion. G
Bankers—Cheque—Conversion—Previous action against indorsee—Waiver of tort.

E. was the secretary and a director of the plaintiff company. Without authority, he indorsed a cheque, made payable to his company, to M.F.G. Trust, Ltd. The defendant bank accepted it for collection, and credited the proceeds to the account of M.F.G. Trust, Ltd. Subsequently, the plaintiff company commenced an action against M.F.G. Trust, Ltd., to recover the value of the cheque as a loan, or, in the alternative, as money had and received. Before final judgment, M.F.G. Trust, Ltd., went into liquidation. The plaintiffs put in a proof for the sum alleged to be due in the liquidation, but the proof was not admitted, as the funds to meet the demands of creditors were H

merely trivial. They then brought the present action against the bank for wrongful conversion of the cheque. The defence pleaded was, *inter alia*, that the plaintiffs had ratified E.'s indorsement of the cheque by suing the M.F.G. Trust, Ltd., and had, therefore, waived the tort, to which it was answered that there could be no waiver, as no judgment had been obtained against M.F.G. Trust, Ltd. :—

A HELD : (i) there was no election or waiver, as the plaintiffs were not called to elect until they applied for judgment against M.F.G. Trust, Ltd.

(ii) even if the plaintiffs had waived the tort or elected against M.F.G. Trust, Ltd., the earlier proceedings provided the defendant bank with no defence, because the plaintiffs had not received satisfaction for their loss.

B (iii) in any event, the defendant bank was liable, because the tort of conversion, of which the bank was guilty, was a tort quite separate from that of M.F.G. Trust, Ltd.

Order of Court of Appeal ([1939] 1 All E.R. 676) *reversed*.

[EDITORIAL NOTE. It has always been settled law that an action based on contract or implied contract, if pursued to judgment, is a bar to a subsequent action in tort in respect of the same facts. In consequence of certain *dicta*, it had been suggested that the commencement of the action in contract was a "waiver of the tort," although the action was not continued to judgment, and this view was adopted by the Court of Appeal in the present case. The House of Lords, however, after a complete review of all the authorities, have rejected this view, and there is no waiver unless judgment is recovered in the action.

D AS TO WAIVER OF TORT, see HALSBURY, *Hailsham* Edn., Vol. 32, pp. 160, 161, para. 227 ; and FOR CASES, see DIGEST, Vol. 42, pp. 994-996, Nos. 215-241.]

Cases referred to :

- (1) *Howard v. Wood* (1679), 1 Freem. K.B. 473 ; 12 Digest 565, 4702 ; 2 Lev. 245.
- (2) *Arris & Arris v. Stukely* (1677), 2 Mod. Rep. 260 ; 12 Digest 565, 4701.
- (3) *Lamine v. Dorrell* (1705), 2 Ld. Raym. 1216 ; 12 Digest 562, 4673.
- E (4) *Sinclair v. Brougham*, [1914] A.C. 398 ; 12 Digest 540, 4487 ; 83 L.J.Ch. 465 ; 111 L.T. 1 ; *varying* S.C. *sub nom.* *Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183 ; *subsequent proceedings sub nom.* *Re Birkbeck Permanent Benefit Building Society*, [1915] 1 Ch. 91.
- (5) *Lightly v. Clouston* (1808), 1 Taunt. 112 ; 34 Digest 521, 4392.
- (6) *Foster v. Stewart* (1814), 3 M. & S. 191 ; 34 Digest 521, 4393.
- F (7) *Smith v. Baker* (1873), L.R. 8 C.P. 350 ; 42 Digest 996, 237 ; 42 L.J.C.P. 155 ; 28 L.T. 637.
- (8) *Hitchin v. Campbell* (1772), 2 Wm. Bl. 779 ; 21 Digest 208, 489.
- (9) *Morris v. Robinson* (1824), 3 B. & C. 196 ; 21 Digest 226, 589.
- (10) *Valpy v. Sanders* (1848), 5 C.B. 886 ; 43 Digest 535, 706 ; 17 L.J.C.P. 249 ; 11 L.T.O.S. 201.
- G (11) *Brewer v. Sparrow* (1827), 7 B. & C. 310 ; 42 Digest 996, 239 ; 6 L.J.O.S.K.B. 1.
- (12) *Buckland v. Johnson* (1854), 15 C.B. 145 ; 21 Digest 222, 566 ; 23 L.J.C.P. 204 ; 23 L.T.O.S. 190.
- (13) *Rice v. Reed*, [1900] 1 Q.B. 54 ; 42 Digest 977, 86 ; 69 L.J.Q.B. 33 ; 81 L.T. 410.
- II (14) *Hunter v. Prinsep* (1808), 10 East, 378 ; 12 Digest 566, 4714.
- (15) *Verschures Creameries v. Hull & Netherlands S.S. Co.*, [1921] 2 K.B. 608 ; 42 Digest 995, 233 ; 91 L.J.K.B. 39 ; 125 L.T. 165.
- (16) *Slade's Case* (1602), 4 Co. Rep. 91a ; 24 Digest 615, 6460.
- (17) *King v. Leith* (1787), 2 Term Rep. 141 ; 5 Digest 923, 7549.
- (18) *Marsh v. Keating* (1834), 2 Cl. & Fin. 250 ; 12 Digest 564, 4695 ; 1 Bing. N.C. 198.

- (19) *Kelly v. Metropolitan Ry. Co.*, [1895] 1 Q.B. 944; 42 Digest 970, 22; 64 L.J.Q.B. 568; 72 L.T. 551.
- (20) *Scarf v. Jardine* (1882), 7 App. Cas. 345; 12 Digest 596, 4956; 51 L.J.Q.B. 612; 47 L.T. 258.
- (21) *Dumport's Case* (1603), 4 Co. Rep. 119 b; 31 Digest 393, 5393.
- (22) *Lissenden v. C.A.V. Bosch, Ltd.*, [1940] A.C. 412; [1940] 1 All E.R. 425; Digest Supp.; 162 L.T. 195. A
- (23) *Dalston v. Janson* (1795), 1 Salk. 10.
- (24) *Matthews v. Hopkin* (1665), 1 Sid. 244.
- (25) *Dickson v. Clifton* (1766), 2 Wils. K.B. 319.
- (26) *Mast v. Goodson* (1772), 2 Wm. Bl. 848; 19 Digest 176, 1272.
- (27) *Brown v. Dixon* (1786), 1 Term. Rep. 274.
- (28) *Wilson v. Poulter* (1730), 2 Stra. 859; 43 Digest 467, 57. B
- (29) *Lythgoe v. Vernon* (1860), 5 H. & N. 180; 43 Digest 536, 709; 29 L.J. Ex. 164.
- (30) *Burn v. Morris* (1834), 2 Cr. & M. 579; 42 Digest 996, 236; 3 L.J. Ex. 193.
- (31) *Davis v. Petrie*, [1906] 2 K.B. 786; 5 Digest 1108, 9034; 75 L.J.K.B. 992; 95 L.T. 239.
- (32) *Moses v. Macferlan* (1760), 2 Burr. 1005; 12 Digest 539, 4478. C
- (33) *Marriot v. Hampton* (1797), 7 Term. Rep. 269; 12 Digest 560, 4650.
- (34) *Dalton v. Whitem* (1842), 3 Q.B. 961; 18 Digest 296, 318; 12 L.J.Q.B. 55.
- (35) *Hambly v. Trutt* (1776), 1 Cowp. 371; 24 Digest 614, 6447.
- (36) *Smith v. Hodson* (1791), 4 Term Rep. 211; 4 Digest 404, 3681.
- (37) *John v. Dodwell & Co.*, [1918] A.C. 563; 43 Digest 535, 705; 87 L.J.P.C. 92; 118 L.T. 661. D
- (38) *Hovil v. Pack* (1806), 7 East, 164; 5 Digest 931, 7619.
- (39) *Maskell v. Horner*, [1915] 3 K.B. 106; 12 Digest 558, 4635; 84 L.J.K.B. 1752; 113 L.T. 126.
- (40) *Knibbs v. Hall* (1794), 1 Esp. 84; 31 Digest 244, 3832.
- (41) *Lindon v. Hooper* (1776), 1 Cowp. 414; 18 Digest 448, 1846.
- (42) *Gulliver v. Cosens* (1845), 1 C.B. 788; 18 Digest 447, 1842; 14 L.J.C.P. 215; 5 L.T.O.S. 199. E

APPEAL by the plaintiffs in the court of first instance from an order of the Court of Appeal, dated Feb. 23, 1939, and reported [1939] 1 All E.R. 676, affirming a judgment of GODDARD, J., dated May 25, 1938. The facts and the arguments are fully set out in the opinion of F
VISCOUNT SIMON, L.C.

A. T. Denning, K.C., and *M. A. B. King-Hamilton* for the appellants.
G. H. B. Streatfeild, K.C., and *Clive S. S. Burt* for the respondents.

VISCOUNT SIMON, L.C.: My Lords, the appellant company was the G
plaintiff in an action brought against the respondent bank in the following circumstances. A company called Lower Ancobra (Gold Coast) Areas, Ltd., owed the appellants a sum of £1,900, and in payment drew a cheque for that amount, making it payable to the appellant company or order. The appellant company had a secretary named Emons, who H
had authority to indorse cheques for the purpose of paying them into the appellant company's bank account, but had no authority to indorse cheques specially on behalf of the appellant company for the purpose of enabling payment to be made to a third party. Emons, purporting to act on the appellant company's behalf, specially indorsed the cheque so

as to make it payable to the M.F.G. Trust, Ltd. (hereinafter called M.F.G.), of which Emons was a director. Thereupon M.F.G. indorsed the cheque and paid it into its account at the respondent bank. The respondent bank knew that Emons, besides being secretary of the appellant company, was a director of M.F.G., but, without making any inquiries, the bank collected the proceeds of the cheque and placed them to the credit of M.F.G.'s account.

By writ issued on Nov. 8, 1937, the appellant company sued the respondent bank for (i) damages for conversion, (ii) alternatively, damages for negligence, (iii) in the further alternative, £1,900 as money had and received by the respondent bank to the use of the plaintiffs. The respondent bank in its defence claimed to be protected from liability by the Bills of Exchange Act, 1882, s. 82, but it did not attempt at the trial to establish that defence, and it became common ground that the circumstances in which the respondent bank had dealt with the cheque were such as would make it liable to the appellant company for the £1,900, unless it was relieved from liability in consequence of earlier proceedings taken by the appellant company in an endeavour to recover the £1,900 from M.F.G. The nature and course of these earlier proceedings must now be stated.

It was not till some time after the misapplication of the cheque that the appellant company discovered anything about it. Neither the receipt of the £1,900 nor the paying away of that amount was reported to the board. Nothing relating to the transaction was to be found in the books of the company until Emons subsequently told the accountants who were writing up the appellant company's books to make entries showing under date Nov. 12, 1934, the receipt of £1,900 from Lower Ancoobra (Gold Coast) Areas, Ltd., and a contemporaneous loan of the same amount to M.F.G. On May 13, 1935, the appellant company issued a writ against M.F.G. claiming the £1,900 as "money lent," or, alternatively, as "money had and received" by M.F.G. to the use of the appellant company. It will be observed that the appellant company at the time had no knowledge of the cheque, or of how any such cheque had been dealt with by the respondent bank. On May 22, 1935, the appellant company signed judgment against M.F.G. in default of appearance, but the judgment was shortly afterwards set aside on the application of M.F.G. In support of this application, Emons made an affidavit on behalf of M.F.G. and swore that the money was not lent by the appellant company to M.F.G., and that M.F.G. did not receive it for the use of the appellant company. The defence delivered by M.F.G. repeated these statements. On Oct. 28, 1935, on the petition of another creditor, a winding up order was made against M.F.G. The action by the appellant company against M.F.G. was thereupon automatically stayed before trial, and no judgment was ever obtained. On Dec. 10, 1935, the appellant company signed an affidavit of proof of debt in the liquidation of M.F.G., stating that M.F.G. was indebted to the amount

of £1,900 to the appellant company for money lent or money had and received, but this proof was never admitted. There was thus never any recovery, either by judgment or otherwise, of any part of the sum claimed from M.F.G. In the course of the proceedings against M.F.G., the appellant company learned that a cheque for £1,900 had been indorsed over by Emons to M.F.G., and in June, 1935, they obtained a copy of the cheque, which showed that it had been cleared through the respondent bank. Hence the present action. A

The question to be decided in this appeal is whether the proceedings against M.F.G., carried on up to the point which they in fact reached, constitute a valid ground of defence for the respondent bank, and so relieve it in the present action from a liability, which would otherwise certainly attach to it, to repay to the appellant company the sum of £1,900, of which they have been deprived, and which they have not received from any other source. The view taken by the courts below is that the appellant company, by bringing their action against M.F.G., elected to "waive the tort," and thereby became irrevocably committed, even against a different defendant, to the view that Emons was, as he professed to be, duly authorised as the appellant company's agent to deal with the cheque as he did. If so, the bank's dealing with the cheque was not tortious, and the present action would fail. GODDARD, J., who tried the action, was conscious that such a conclusion might seem, as a matter of justice and common sense, difficult to accept, for he said : B C D

It is not easy to see why this act of suing the M.F.G. Trust for the money lent should enure to the benefit of the bank, who were not parties to that action and who in no way altered their position in consequence of any action which United Australia took in suing the M.F.G. Trust, but it seems to me that I have no option but to hold that the action of so doing does free the bank, because now it cannot be said that the dealing in the cheque was tortious, and if the dealing in the cheque was not tortious, if it was not conversion, then the bank cannot be guilty of any wrong in the matter. E

It was thus the issue of the writ against M.F.G. which the judge regarded as sufficient to provide the bank with a valid defence. CLAUSON, L.J., who delivered the judgment of the Court of Appeal, followed a similar line of reasoning. He said, at p. 679 ; F

... the claim for money lent involved the position that there had never been any tort at all, but that the £1,900, in the form of a cheque specially indorsed to M.F.G., had been properly passed by Emons . . . to M.F.G. by way of loan. The claim for money had and received did, however, involve the position that there had been a tortious acquisition of the money by M.F.G., but also involved a waiver of the tort, and an election to claim against the defendants [the M.F.G. Trust] in *assumpsit*—that is, on the footing of a quasi-contractual liability to refund. G

Thus the Court of Appeal also regarded the initiation of the action against M.F.G. as a conclusive election which prevented the appellants from thereafter alleging that the bank converted the cheque. H

The House has now to decide whether the courts below are right in holding that the appellants are barred from recovering judgment against the bank because they previously instituted proceedings, on the basis of "waiving the tort" against M.F.G., when those proceedings never

produced any judgment or satisfaction in the plaintiff's favour. This question may be conveniently dissected by first asking whether there would be any such bar even if the present action were an action in tort against M.F.G. If a remedy in tort would remain open against the same defendant, then there certainly cannot have been any conclusive election which could prevent an action against a different defendant, who had previously not been sued at all. The process known as "waiving the tort" can be traced back to the latter half of the seventeenth century, when much accurate learning and refined analysis were addressed to determining what were the appropriate forms of action in which a claim could, or should, be embodied. Thus in 1679 in *Howard v. Wood* (1) the plaintiff brought his claim in *assumpsit* for fees due to him as steward of the Honor of Pomfret against a defendant who had received the fees under a subsequent grant of the office, which was not valid. It was objected :

... that this action will not lie for the money received by the defendant as money received for the plaintiff's use, because the defendant claimed title by another grant made to himself, and therefore received it to his own use ; and that the plaintiff should have brought an action of trover for the money, or case, for disturbing him in his office.

To this the Court of King's Bench answered :

That it might be hard perhaps to maintain it, if this were a new case, and the first of this nature ; but they said two or three actions of this kind had been held before, and cited a case between *Bradshaw* and *Porter* of Grays Inn, for money received as judge of the Sheriff's Court of London to be so resolved ; and therefore it would be hard now to adjudge the contrary.

In 1677, a similar objection to the plaintiff proceeding in *assumpsit* to recover the profits of an office which had wrongly been received by the defendant was overruled by the Court of Exchequer in *Arris & Arris v. Stukely* (2), where the argument of the Solicitor-General, Sir Francis Winnington, is thus reported, at p. 262 :

An *indebitatus assumpsit* would lie here ; for where one receives my rent, I may charge him as bailiff or receiver ; or if any one receive my money without my order, though it is a tort yet an *indebitatus* will lie, because by reason of the money the law creates a promise ; and the action is not grounded on the tort, but on the receipt of the profits in this case.

Another example of the same objection being overruled is found in *Lamine v. Dorrell* (3), where an administrator of an estate sued in *assumpsit* to recover proceeds which had been gathered in by a former administrator whose appointment had been revoked. In that case, POWELL, J., said, at p. 1216 :

It is clear that the plaintiff might have maintained detinue or trover for the debentures, but when the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reason of *assumpsits*. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as money received to his use. It has been carried thus far already.

Later, HOLT, C.J., said, at p. 1217, that "These actions have crept in by degrees," and added [p. 1217] :

... he could not see how it differed from an *indebitatus assumpsit* for the profits

of an office by a rightful officer against a wrongful, as money had and received by the wrongful officer to the use of the rightful.

It is not necessary in this connection to discuss the logical basis of the writ of *indebitatus assumpsit*. My noble and learned friend LORD WRIGHT has submitted it to searching analysis in his essay on the decision of this House, a quarter of a century ago, in *Sinclair v. Brougham* (4) (LEGAL ESSAYS AND ADDRESSES BY LORD WRIGHT OF DURLEY, Cambridge University Press, p. 1). Suffice it to say that the device of "waiving the tort" and suing in *assumpsit* soon spread. A learned author includes among torts which can be waived conversion, trespass to land or goods, deceit, occasionally action upon the case, and the action for extorting money by threats: WINFIELD ON THE PROVINCE OF THE LAW OF TORT, p. 169. An extreme instance is provided in *Lightly v. Clouston* (5), where the defendant had wrongfully taken the plaintiff's apprentice into his employment, and the plaintiff, instead of suing for seduction, successfully claimed in *assumpsit* against the defendant who had tortiously employed him. MANSFIELD, C.J., said, at p. 114:

This case approaches as nearly as possible to the case where goods are sold, and the money has found its way into the pocket of the defendant.

Six years later, LORD ELLENBOROUGH, in *Foster v. Stewart* (6), doubted whether this was not going too far. At any rate, it is clear that there are torts to which the process of waiver could not be applied. The tort of defamation, for example, or of assault, could not be dressed up into a claim in *assumpsit*.

Where "waiving the tort" was possible, it was nothing more than a choice between possible remedies, derived from a time when it was not permitted to combine them or to pursue them in the alternative, and when there were procedural advantages in selecting the form of *assumpsit*. For example, there were no pitfalls in drawing the declaration in *assumpsit*, and the cause of action did not drop with death. On the other hand, there were advantages for the defendant too, for an action framed in *assumpsit* permitted the defendant to plead the general issue: STEPHEN'S PRINCIPLES OF PLEADING, 2nd Edn., p. 197. *Lamine v. Dorrell* (3) contains the first judicial reference which I have been able to find to the effect of success in pursuing one form of action in barring proceedings under the other. HOLT, C.J., observes, at p. 1217:

If an action of trover should be brought by the plaintiff for these debentures after judgment in this *indebitatus assumpsit*, he may plead this recovery in bar of the action of trover, in the same manner as it would have been a good plea in bar for the defendant to have pleaded to the action of trover, that he sold the debentures, and paid to the plaintiff in satisfaction. But it may be a doubt if this recovery can be pleaded before execution.

It will be observed that HOLT, C.J., does not say that the commencement of an action in one form bars the possibility of recovery under another form of action. Even against the same party, the bar only arises, in his view, at earliest on recovering judgment.

The Court of Appeal largely relied upon a passage in the judgment of BOVILL, C.J., in *Smith v. Baker* (7), at p. 355, though they noted that the correctness of this passage had been doubted. I will deal with the judgments in *Smith v. Baker* (7) in a moment, but I must first examine the earlier cases referred to in the Court of Appeal's judgment which, in their view, gave no support to the doubt thus expressed. I cannot agree that they are irrelevant. *Hitchin v. Campbell* (8), which was treated as having no bearing on the point now in issue, appears to me, on the contrary, to indicate clearly the distinction which it is all-important to bear in mind. DE GREY, C.J., in delivering the judgment of the court, discusses, at p. 830, the two questions whether the plaintiff by proceeding upon the tort bars himself from proceeding upon *assumpsit*, or whether, in order to create a bar, the first proceeding must not go as far as judgment, and he reaches the conclusion that one personal action not going to judgment is no bar to another being brought, but that, if judgment is had on the merits, then it bars all other personal suits from the same cause of action. The Court of Appeal also were of opinion that *Morris v. Robinson* (9) threw no light on the problem before them. For reasons which I will state hereafter, it appears to me to be, perhaps, of all the decisions in the books, the one which is most nearly analogous to the present case. There remains, among the older authorities referred to by the Court of Appeal, the decision in *Valpy v. Sanders* (10), which is not directly relevant, but which clearly implies that an unsatisfied claim for payment on the basis that the defendant had bought goods from a bankrupt does not bar the assignees of the bankrupt from maintaining a subsequent action of trover.

The Court of Appeal judgment also referred to a passage in BULLEN AND LEAKE ON PLEADINGS, 3rd Edn., p. 48 :

... where the plaintiff is entitled to waive the wrongful character of the transaction, in order to claim his money or the proceeds of his goods which have been wrongfully obtained, by so doing he precludes himself from claiming any damages for the wrong done.

However, this throws no light on what constitutes waiver, and falls far short of implying that the mere institution of an action is waiver. Indeed, the cases cited at the end of this passage relate to other facts alleged to constitute a waiver. For example, in *Brewer v. Sparrow* (11), the plaintiffs had without litigation accepted payment from the defendant on the basis that he was their agent to sell the goods, and, having thus received satisfaction for the wrongful act, could not afterwards treat the defendant as a wrongdoer and maintain trover. This brings me to *Smith v. Baker* (7). BOVILL, C.J., says, at p. 355 :

The law is clear that a person who is entitled to complain of a conversion of his property, but who prefers to waive the tort, may do so and bring his action for money had and received for the proceeds of goods wrongfully sold. The law implies, under such circumstances, a promise on the part of the tortfeasor that he will pay over the proceeds of the sale to the rightful owner. But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort ; and so the commencement of an action of trespass

or trover is a conclusive election the other way. The principles which govern the subject are very well illustrated in the case of *Buckland v. Johnson* (12), where it is held that the plaintiff having sued one of two joint tortfeasors in tort could not afterwards sue the other for money had and received.

Undoubtedly, my Lords, BOVILL, C.J., in this passage suggests that it is the bringing of the action which constitutes a conclusive election. However, this is an isolated *dictum*, not at all necessary for the case with which BOVILL, C.J., was dealing. The *dictum* was not affirmed by his colleagues, for KEATING, J., after first stating that counsel had admitted that, if the plaintiff had brought an action for money had and received, that would amount to a conclusive election to waive the tort, restates the admission, a few lines lower down, as being that the "recovering of the proceeds by an action for money had and received" would be a conclusive election. It is the second proposition, and not the first, which is correct. The third judge, HONYMAN, J., treats the election as conclusive where the plaintiff has obtained some advantage, and this again vetoes the idea that the mere issue of a writ constitutes election. The actual question in *Smith v. Baker* (7) arose out of a claim for money had and received which did not go to judgment, but, under the order of the Court of Bankruptcy, the proceeds of the sale had been paid over to the plaintiff, who, it was held, could not then bring an action. In the words of KEATING, J., what happened was substantially equivalent to recovering in an action for money had and received.

Moreover, *Buckland v. Johnson* (12), which BOVILL, C.J., cited, is no authority for the proposition which it was vouched to illustrate. That was not a case where the plaintiff was barred from pursuing a second action for money had and received because he had already sued in tort. The plaintiff had not merely sued, he had recovered, in the first action, and it was the fact that he had recovered which constituted a bar. All the judgments in *Buckland v. Johnson* (12) confirm this view. For instance, JERVIS, C.J., says that the question which was substantially at issue between the parties was [p. 161]:

... whether there had been a substantial recovery by the plaintiff in the former action, so as to bar his right to recover in this.

Later, MAULE, J., at p. 165, says that the substantial answer to the second action is that there had been an action for the conversion and recovery under it. He goes on, at p. 166:

Having his election to sue in trover for the value of the goods at the time of the sale, or for the proceeds of the sale as money had and received, the plaintiff elected the former remedy, and he has obtained a verdict and judgment. He has, therefore, got what the law considers equivalent to payment, viz. a judgment for the full value of the goods . . . Having once recovered a judgment, his remedy was altogether gone . . .

Then CROWDER, J., says, at p. 168:

... the plaintiff, having made his election to sue for the tort, and having recovered what the jury considered the value of the goods at the time of the conversion, cannot now bring money had and received in respect of the same cause of action.

My Lords, it is remarkable that the passage above cited from BOVILL, C.J., in *Smith v. Baker* (7), together with his reference to *Buckland v. Johnson* (12), should have been quoted and relied upon in some subsequent judgments, as well as in some textbooks, without due note being taken of the facts that the proposition of BOVILL, C.J., was a mere *obiter dictum*, that the other judges in that case did not agree with him on the point, that the decision of *Buckland v. Johnson* (12) did not support the proposition at all, and that as long ago as the time of SIR JOHN HOLT the true proposition had been laid down that it is judgment in the first action, and not merely the bringing of the claim, which constitutes a bar to the second action. The contradiction between these two views becomes yet more striking when one examines the judgments of the Court of Appeal in *Rice v. Reed* (13). The members of the court reached a unanimous conclusion on a view of the facts, and yet A. L. SMITH, L.J., at p. 66, expresses his agreement with the proposition of BOVILL, C.J., while that very accurate common lawyer, VAUGHAN WILLIAMS, L.J., at p. 66, lays down the true rule that, where there has been no judgment, the plaintiff has not lost his alternative remedy. This review of the authorities convinces me that the oft-quoted *dictum* of BOVILL, C.J., in *Smith v. Baker* (7) is wrong. There is, as far as I can discover, no reported case which has ever laid it down as matter of decision that, when the plaintiff "waives the tort" and starts an action in *assumpsit*, he then and there debars himself from a future proceeding based on the tort. It would be very remarkable if it were so. As LORD ELLENBOROUGH said in *Hunter v. Prinsep* (14), at p. 391 :

I But the fallacy of the argument . . . appears to us to consist in attributing more effect to the mere form of this action than really belongs to it. In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint, with a view to damages, of the tortious act by which the goods were converted into money ; and takes to the neat proceeds of the sale as the value of the goods.

F When the plaintiff "waived the tort" and brought *assumpsit*, he did not thereby elect to be treated from that time forward on the basis that no tort had been committed. Indeed, if it were to be understood that no tort had been committed, how could an action in *assumpsit* lie ? It lies only because the acquisition of the defendant is wrongful, and there is thus an obligation to make restitution.

G The true proposition is well formulated in the Restatement of the Law of Restitution promulgated by the American Law Institute, p. 525 :

H A person upon whom a tort has been committed and who brings an action for the benefits received by the tortfeasor is sometimes said to "waive the tort." The election to bring an action of *assumpsit* is not, however, a waiver of tort but is the choice of one of two alternative remedies.

Contrast with this instances of true waiver of rights—e.g., waiver of forfeiture by receiving rent.

If, under the old forms of procedure, the mere bringing of an action while waiving the tort did not constitute a bar to a further action based

on the tort, still less could such a result be held to follow after the Common Law Procedure Act, 1852, and the Judicature Act, 1875, for it is now possible to combine in a single writ a claim based on tort with a claim based on *assumpsit*, and it follows inevitably that the making of the one claim cannot amount to an election which bars the making of the other. No doubt, if the plaintiff proved the necessary facts, he could be required to elect on which of his alternative causes of action he would take judgment, but that has nothing to do with the unfounded contention that election arises when the writ is issued. There is nothing conclusive about the form in which the writ is issued, or about the claims made in the statement of claim. A plaintiff may at any time before judgment be permitted to amend. The substance of the matter is that, on certain facts, he is claiming redress, either in the form of compensation—that is, damages as for a tort—or in the form of restitution of money to which he is entitled, but which the defendant has wrongfully received. The same set of facts entitles the plaintiff to claim either form of redress. At some stage of the proceedings, the plaintiff must elect which remedy he will have. There is, however, no reason of principle or convenience why that stage should be deemed to be reached until the plaintiff applies for judgment.

So far, I have been discussing what is the true proposition of law when the second action is brought against the same defendant. In the present case, however, the action which is said to be barred by former proceedings against M.F.G. is not an action against M.F.G. at all, but an action against Barclays Bank. I am quite unable to see why this second action should be barred by the plaintiffs' earlier proceedings against M.F.G. In the first place, the tort of conversion of which the bank was guilty is quite a separate tort from that done by M.F.G. M.F.G.'s tort consisted in taking the cheque away from the appellants without the appellants' authority. That tort would have equally existed if M.F.G., instead of getting the cheque cleared through the bank, had kept it in its own possession. The bank's tort, on the other hand, consisted in taking a cheque, which was the property of the appellants, and without their authority using it to collect money which rightly belonged to the appellants. M.F.G. and the bank were not joint tortfeasors, for two persons are not joint tortfeasors because their independent acts cause the same damage.

Apart from this, however, what ground is there for saying that proceedings in which M.F.G. were sued on the basis of waiving the tort, but which never resulted in satisfaction, should be regarded as a bar to suing the bank for conversion? A case which comes near to the present is *Morris v. Robinson* (9). There, cargo belonging to the plaintiffs had been improperly sold during the course of a voyage. There were thus two lines of remedy which the plaintiffs could pursue. They first brought an action against the shipowners for breach of their duty as carriers, with a count in trover. They recovered a verdict, but they

did not enter up judgment, and there had been no actual satisfaction of their claim. Instead, they brought another action against different defendants—namely, an action for conversion against the purchasers who had bought the cargo. It was held by the Court of King's Bench that the former action was no bar, and that the defendants in the second
 A action were liable for their act in purchasing the plaintiffs' goods. BAYLEY, J., in giving judgment, observed, at p. 205 :

If concurrent actions had been brought, that against the owners could not have barred the other ; why then should it have that effect because they had been brought at different times ? If indeed the plaintiffs were to recover the full value of the goods in each action, the court of equity would interfere to prevent them
 B from having double satisfaction, but there is nothing in the former action which can, in a court of law, prevent the recovery in this.

Similar reasoning, as it seems to me, would apply in the present case, and it follows that the earlier proceedings against M.F.G. could provide the present respondents with no defence unless, as a result of them, the
 C plaintiffs had received satisfaction for their loss.

This conclusion makes it unnecessary to consider and decide upon a further argument which was strongly urged on behalf of the appellants—namely, that the appellants, when instituting proceedings against M.F.G., could not be regarded as finally electing, since at that time the plaintiff
 D company knew nothing of the existence of the cheque or its treatment by the respondent bank, and election involves the knowledge of all material facts. Neither is it necessary to deal with a further suggestion made during the argument that, inasmuch as a company would not be acting *intra vires* if it authorised its secretary to pay away its money to
 E a third party without getting anything in return, the appellants could not ratify the act of Emons when he professed to be acting on the appellants' behalf in doing so. As for the more recent decision of *Verschures Creameries v. Hull & Netherlands S.S. Co.* (15), upon which much reliance was placed in the courts below, it is sufficient to say that it can be distinguished from the present case on the ground that there the earlier
 F of the two actions ended in the plaintiffs recovering judgment, whereas in the present case the appellants got no judgment against M.F.G. at all. To avoid misunderstanding, I must add that I do not think that the respondents in the present case would escape liability, even if judgment
 G had been entered in the appellant company's earlier action against M.F.G. What would be necessary to constitute a bar, as BAYLEY, J., pointed out in *Morris v. Robinson* (9), would be that, as the result of such judgment, or otherwise, the appellants should have received satisfaction.

My Lords, I am glad that it is possible to reach this result, for the
 H alternative view, which is based upon a misreading of technical rules, now happily swept away, would have worked substantial injustice. The appellants have lost their money, and they have lost it owing to the tort of the respondent bank. Why should they not recover it in this action ? Nothing which has previously happened in the proceedings against M.F.G., no earlier step taken by the appellants, has prejudiced

the position of the bank in any way. All that the respondents have been deprived of is the fleeting prospect of avoiding responsibility if the appellants had succeeded in obtaining satisfaction from another party. The "general principles of right," to which the Court of Appeal referred in its judgment, would surely indicate that the respondent bank should not escape because the appellants have wasted time and money in pursuing another remedy which turned out to be illusory. A

LORD CAMPBELL, in his LIFE OF LORD ELLENBOROUGH, Ch. XLVI, permits himself the reflection that :

. . . in the exquisite logic of special pleading rightly understood, there is much to gratify an acute and vigorous understanding. B

I may add that LORD CAMPBELL himself was one of three future Lord Chancellors who were pupils of Mr. William Tidd, and might be expected loyally to subscribe to the ecstatic comment "Oh, what a writer Mr. Tidd is, Master Copperfield!" However, while admiring the subtlety of the old special pleaders, our courts are primarily concerned to see that rules of law and procedure should serve to secure justice between the parties. I move that this appeal be allowed with costs here and below, and that judgment be entered for the appellants for £1,900, with interest at 4 per cent. per annum as from Nov. 12, 1934. C

D
LORD ATKIN [read by LORD THANKERTON]: My Lords, the only question in this case is whether the plaintiffs have precluded themselves from recovering damages from the defendant bank for what is now admitted to be a conversion by the bank of a cheque for £1,900, the property of the plaintiffs. It is said that, by certain proceedings which they took against the customers for whom the bank collected the cheque, the plaintiffs have waived the tort, and lost the right of suing for damages. E
The facts relate to three companies—namely, United Australia, Ltd., the plaintiffs, who were the payees of the cheque, Lower Ancobra (Gold Coast) Areas, Ltd., the drawers of the cheque, and M.F.G. Trust, Ltd., for whom the bank collected the cheque, and into whose account with them they paid the proceeds. It appears that the plaintiff company sought to do business in mining concessions. The principal shareholder was one Grimwade, who in 1934 had become acquainted with James Gould, an experienced financier who had the misfortune to be an undischarged bankrupt. M.F.G. Trust, Ltd., was a company which received the benefit of some of Gould's financial operations. The initials are the initials of Gould's wife, a lady of fortune, and the name is a guide to the nature of the company. It had the advantage of having Gould as its accountant. Lower Ancobra (Gold Coast) Areas, Ltd., was another company which was interested in gold mining concessions. Gould was closely associated also with it, but, in his position, could not, of course, be a director. In Apr., 1934, Grimwade was proceeding to West Africa for the purpose of obtaining mining concessions. On Gould's suggestion, Grimwade arranged to have Emons, a clerk of Gould's, appointed a F

director of the company, and also secretary. Emons was given authority to indorse cheques for collection by the company's bank, but not otherwise. Grimwade before leaving gave a joint and several power of attorney to Gould and Davies, a solicitor, in pursuance of which Gould appears substantially to have managed the affairs of the company in
 A Grimwade's absence. There was also another director, Kent Jones, who attended meetings, but appears to have been given little information as to the company's affairs. It would appear that, by agreements made in June, 1934, and Aug., 1934, the plaintiff company agreed to sell certain concessions which had been obtained by Grimwade to the Lower
 B Ancobra company for £5,000 in cash and a certain number of shares. The £5,000 in cash was paid by the Lower Ancobra company by 3 cheques drawn in favour of the plaintiff company, June 29, 1934, £1,200, Oct. 24, 1934, £1,900, and Nov. 12, 1934, £1,900. The first two cheques were paid into the company's account, and no question arises on them. The
 C third cheque, which is the one in question, was indorsed as follows :

Pay to the order of the M.F.G. Trust, Ltd., for and on behalf of United Australia, Ltd., A. H. Emons, Secretary.

How it reached M.F.G. Trust, Ltd., is not disclosed, but it was indorsed
 "for and on behalf of M.F.G. Trust, Ltd., J. C. Gould, Accountant,"
 D and was paid into the defendant bank by someone not identified in evidence on a paying-in slip dated Nov. 12. The teller not unnaturally referred the matter to the manager, indorsing the paying-in slip to that effect. In these days, every bank clerk sees the red light when a company's cheque is indorsed by a company's official into an account which
 E is not the company's. The manager, however, made no inquiries. The cheque was collected and the proceeds placed to the customer's account. Though the bank pleaded the provisions of the Bills of Exchange Act, 1882, which by sect. 82 protects them if they receive payment of a crossed cheque for a customer in good faith and without negligence,
 F they called no evidence, and that section passes out of the case.

In these circumstances, it is clear—and, as I have said, it was not disputed—that the bank converted the cheque, and *prima facie* they would be liable in damages for the value of the cheque. It may be as well to remember that, in the course of dealing with the cheque, there
 G were three separate conversions by three different persons—namely, (i) by Emons, (ii) by the bank, and (iii) by M.F.G. Trust, Ltd.—each of whom could be sued separately for damages for separate torts. These events, however, happened when Grimwade was away. He did not return until Feb., 1935, when he found that the books of account of
 H the company were not at his office, but, according to Emons, were in the possession of either Gould or the auditors. When the books were returned, the journal contained an entry recording the receipt of £1,900 on Nov. 12, and recording on the same date a loan of the same sum to M.F.G. Trust, Ltd. There was no minute in the minute book recording any such loan. Eventually, on May 13, 1935, a specially indorsed

writ was issued against M.F.G. Trust, Ltd., claiming £1,900 as money lent, or, alternatively, as money had and received. Judgment was signed in default of appearance, but was set aside on an explanation of the default and on an affidavit by Emons on behalf of M.F.G. Trust, Ltd., that the plaintiff company had not lent £1,900 to the M.F.G. Trust, Ltd., and that the money had not been received by them to the use of the plaintiffs. In June, the defendants in the action delivered a defence repeating these statements. In October, a compulsory winding up order was made against M.F.G. Trust, Ltd., on a creditor's petition, and the action became automatically stayed. On Dec. 10, the plaintiff company filed an affidavit of proof of debt for money lent or money had and received, the amount indorsed being for money lent. The proof was never admitted, and nothing further was done upon it in the winding up. A B

It was not until June, 1935, that the plaintiff's solicitor discovered the existence of the cheque for £1,900, and still later that he discovered the circumstances in which the cheque had been collected by the bank. On Nov. 8, 1937, the plaintiffs commenced the present action against the bank, claiming damages for conversion, or, alternatively, for negligence, or, alternatively, for money had and received, and on Dec. 7 they delivered a statement of claim supporting the three alternative claims. The defendants' defence, delivered on Jan. 10, relied on the provisions of the Bills of Exchange Act, 1882, but on Apr. 11, 1938, the defence was amended to include a plea which I read as a plea alleging a ratification of the act of Emons purporting to act as the plaintiffs' agent by electing to adopt the payment to M.F.G. Trust, Ltd., as a loan. It is quite clear that there never was even a pretended loan. M.F.G. Trust, Ltd., had repudiated the allegation of loan, both in their affidavit and in their defence, and Emons had never purported to take part in making any loan. However, though this plea proved to be completely without foundation, for some reason which was not explained it was treated by the judge and by the parties alike as amounting to a plea that, by suing and proving for the amount as money lent or money had and received, the plaintiffs had elected to waive the tort. It is on that footing that the case was argued in the courts below and in this House, but, while the trial judge appears to have decided the case upon the ground that, by suing M.F.G. Trust, Ltd., for money lent, the plaintiffs freed the bank, the Court of Appeal appear rather to rely upon the claim for money had and received. C D E F G

My Lords, we are thus compelled to consider the law relating to waiver of tort, and two questions arise : (i) Did the plaintiffs waive the conversion by M.F.G. Trust, Ltd., by suing them and proving in their liquidation for money lent or money had and received ? (ii) If they did waive conversion by the M.F.G. Trust, Ltd., was that a waiver by them of the conversion by the defendant bank ? I do not propose to discuss at any length the history of the claim in *indebitatus assumpsit*, and the cases H

through which that history has been traced. Very much learning has been devoted to this subject, and lawyers are indebted to Professor Ames, Sir William Holdsworth, and Professor Winfield for the light they have thrown upon the subject in well-known works, and I should not like to omit R. M. JACKSON ON THE HISTORY OF QUASI-CONTRACT IN ENGLISH
 A LAW, published in 1936 in the Cambridge Studies in English Legal History, from which I have derived assistance. There is also what I hope I may respectfully call a valuable contribution to the discussion in the articles recently published by my noble and learned friend LORD
 B WRIGHT on *Sinclair v. Brougham* (4), and a review of the American Restatement of the Law of Restitution in LEGAL ESSAYS AND ADDRESSES, 1939, pp. 1-65. I have myself consulted most of the cases referred to in these works, with the exception of the cases from the Year Books, which I have accepted from the authors.

The story starts with the action of debt, which was not necessarily
 C based upon the existence of a contract, for it covered claims to recover sums due for customary dues, penalties for breaches of bye-laws and the like. The action of debt had its drawbacks, the chief being that the defendant could wage his law. There followed the application of the action on the case of *assumpsit* to debt: "The defendant being indebted
 D then promised." At first there must be an express promise. Then the courts implied a promise from an executory contract: *Slade's Case* (16). *Slade's Case* (16) was not a claim in *indebitatus assumpsit*, but the principle was applied, and it became unnecessary to prove an express promise in those cases. Then the action was allowed in respect of cases where there
 E was no contract, executory or otherwise, as in the cases where debt would have lain for customary fees and the like, and, by a final and somewhat forced application, in respect of cases where the defendant had received money of the plaintiff to which he was not entitled. These included cases where the plaintiff had intentionally paid money to the
 F defendant—e.g., claims for money paid on a consideration which wholly failed and money paid under a mistake—cases where the plaintiff had been deceived into paying money, and cases where money had been extorted from the plaintiff by threats or duress of goods. They also included cases where money had not been paid by the plaintiff at
 G all, but had been received from third persons, as where the defendant had received fees under colour of holding an office which in fact was held by the plaintiff, and, finally, cases like the present, where the defendant had been wrongfully in possession of the plaintiff's goods, had sold them, and was in possession of the proceeds. To find a basis for the actions
 H in any actual contract, whether express or to be implied from the conduct of the parties, was, in many of the instances given, obviously impossible. The cheat or the blackmailer does not promise to repay to the person he has wronged the money which he has unlawfully taken. Nor does the thief promise to repay to the owner of the goods stolen the money which he has gained from selling the goods. Nevertheless, if a man so

wronged were to recover the money in the hands of the wrongdoer, and it was obviously just that he should be able to do so, it was necessary to create a fictitious contract, for there was no action possible other than debt or *assumpsit*, on the one side, and action for damages for tort, on the other. The action of *indebitatus assumpsit* for money had and received to the use of the plaintiff in the cases I have enumerated was, therefore, supported by the imputation by the court to the defendant of a promise to repay. The fiction was so obvious that in some cases the judge created a fanciful relation between the plaintiff and the defendant. Thus, in cases where the defendant had wrongfully sold the plaintiff's goods and received the proceeds, it was suggested in some cases, though not in all, that the plaintiff chose to treat the wrongdoer as having sold the goods as his agent, and so as being under an implied contract to his principal to repay. Even here, in the relatively more recent cases where this explanation is given—by GROSE, J., in *King v. Leith* (17), at p. 145, and *Marsh v. Keating* (18), at p. 215, by PARK, J., in delivering the opinion of the judges in the House of Lords—the wrongdoer had in fact in both cases purported to sell the goods as the agent of his principal. However, the fiction is too transparent. The alleged contract by the blackmailer and the robber never was made, and never could be made. The law, in order to do justice, imputed to the wrongdoer a promise which alone, as forms of action then existed, could give the injured person a reasonable remedy. However, while it was just that the plaintiff in such cases should be able to recover the money in the possession of the other party, he was not bound to exercise this remedy. In cases where the money had been received as the result of a wrong, he still had the remedy of claiming damages for tort in actions for trespass, deceit, trover, and the like, but he obviously could not compel the wrongdoer to recoup him his losses twice over. Hence he was restricted to one of the two remedies, and herein, as I think, arose the doctrine of “waiver of the tort.” Having recovered in contract, it is plain that the plaintiff cannot go on to recover in tort. *Transit in rem judicatam*. The doctrine has thus alternatively been said to be based on election—that is, election between two remedies—and the stage at which this election takes place was the subject of discussion in the argument in the present case. I will deal with election later, but at present I wish to deal with the waiver of the tort which is said to arise whenever the injured person sues in contract for money received. If the plaintiff in truth treats the wrongdoer as having acted as his agent, overlooks the wrong, and, by consent of both parties, is content to receive the proceeds, this will be a true waiver. It will arise necessarily where the plaintiff ratifies, in the true sense, an unauthorised act of an agent. In that case, the lack of authority disappears, and the correct view is, not that the tort is waived, but that by retraction of the ratification it has never existed. In the ordinary case, however, the plaintiff has never the slightest intention of waiving, excusing, or in any kind of way palliating the tort. If I find

that a thief has stolen my securities and is in possession of the proceeds, when I sue him for them, I am not excusing him. I am protesting violently that he is a thief, and, because of his theft, I am suing him. Indeed, he may be in prison upon my prosecution. Similarly with the blackmailer. In such a case, I do not understand what can be said to

- A be waived. The man has my money, which I have not delivered to him with any real intention of passing to him the property. I sue him because he has the actual property taken, and I suggest that it can make no difference if he extorted a chattel which he afterwards sold. I protest that a man cannot waive a wrong unless he either has a real intention to
- B waive it or can fairly have imputed to him such an intention, and, in the cases which we have been considering, there can be no such intention, either actual or imputed. These fantastic resemblances of contracts, invented in order to meet requirements of the law as to forms of action which have now disappeared, should not, in these days, be allowed to
- C affect actual rights. When these ghosts of the past stand in the path of justice, clanking their mediæval chains, the proper course for the judge is to pass through them undeterred.

- Concurrently with the decisions as to waiver of tort, there is to be found a supposed application of election, and the allegation is some-
- D times to be found that the plaintiff elected to waive the tort. It seems to me that in this respect it is essential to bear in mind the distinction between choosing one of two alternative remedies and choosing one of two inconsistent rights. As far as remedies were concerned, from the oldest time the only restriction was on the choice between real and
- E personal actions. If you chose the one, you could not claim on the other. Real actions have long disappeared, and, subject to the difficulty of including two causes of action in one writ, which has also now disappeared, there has not been, and there certainly is not now, any compulsion to choose between alternative remedies. You may put them in
- F the same writ, or you may put one in first and then amend and add or substitute another. I will cite one authority which has to deal with the question whether a claim for injury to a passenger was founded on contract or tort for the purposes of the County Courts Act. LORD ESHER said, in *Kelly v. Metropolitan Ry. Co.* (19), at p. 946 :

- G At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure.

- On the other hand, if a man is entitled to one of two inconsistent rights, it is fitting that, when, with full knowledge, he has done an un-
- H equivocal act showing that he has chosen the one, he cannot afterwards pursue the other, which, after the first choice, is by reason of the inconsistency, no longer his to choose. Instances are the right of a principal dealing with an agent for an undisclosed principal to choose the liability of the agent or the principal, the right of a landlord whose forfeiture of a lease has been committed to exact the forfeiture or to treat the

former tenant as still tenant, and the like. To those cases the statement of LORD BLACKBURN in *Scarf v. Jardine* (20), at p. 360, applies :

. . . where a man has an option to choose one or other of two inconsistent things, when once he has made his election it cannot be retracted . . .

In a later passage, at p. 361, LORD BLACKBURN speaks of a man choosing A between two remedies, but it is plain that he is speaking of remedies in respect of the inconsistent things as stated above. The case was one where the plaintiff had a right of recourse against two former partners or against two new partners, but obviously not against both. LORD BLACKBURN quotes *Dumpro's Case* (21), which was a plain case B of inconsistent rights, the question of waiver of a forfeiture. I think, therefore, that, on a question of alternative remedies, no question of election arises until one or other claim has been brought to judgment. Up to that stage, the plaintiff may pursue both remedies together, or, C pursuing one, may amend and pursue the other, but he can take judgment only for the one, and his cause of action on both will then be merged in the one. This seems to me to be the decision both of LORD RUSSELL OF KILLOWEN, C.J., and of VAUGHAN WILLIAMS, L.J., in *Rice v. Reed* (13), and I cannot agree with the *dicta* of A. L. SMITH, L.J., at pp. 65, 66, that to bring an action for money had and received waives D the tort. He founded himself upon words used by BOVILL, C.J., in *Smith v. Baker* (7), at p. 355. The *dictum* was unnecessary, for in that case the plaintiff had obtained an order from the Court of Bankruptcy to hand over the proceeds of a conversion, and had been paid the money. The *dictum* of BOVILL, C.J., is, in my opinion, incorrect. E

In the present case, therefore, I find that the plaintiffs were, at no stage in the proceedings they took against M.F.G. Trust, called to make an election—and, if it were necessary so to hold, in fact made no election—to claim in contract and not to claim in tort, and the foundation of the defendant's defence disappears. However, I think it necessary F to add that, even if the tort had been waived or the plaintiff had made any final election against M.F.G. Trust, Ltd., I fail to see why that should have any effect upon their claims against the bank. If a thief steals the plaintiff's goods, worth £500, and sells them for £50 to a receiver, who sells them to a fourth party for £400, then, if I find the G thief and he hands over to me the £50, or I sue him for it and recover judgment, I can no longer sue him for damages for the value of the goods, but why should that preclude me from suing the two receivers for damages? I shall not be misunderstood as imputing dishonesty in this case, but the instance illustrates the point. I can see no justice H in the contention, and I know of no authority in support of it. *Verschures Creameries v. Hull & Netherlands S.S. Co.* (15), upon which both the courts below founded their decision, has, with great respect, very little bearing on the matter. A firm of carriers, being authorised by the plaintiffs to carry goods to A, delivered them to B. The plaintiffs

invoiced the goods to B, sued him for the price, recovered judgment, and took bankruptcy proceedings against him. They afterwards sued the carriers for misdelivery. It was the plainest case of ratification of an act done by the carriers purporting to deliver on behalf of the plaintiffs, and, as such, there could be no complaint against the carriers for breach
 A of authority. There are statements made in some of the judgments on "approbating and reprobating," but these words have had their proper meaning attributed to them in the judgment of my noble and learned friend VISCOUNT MAUGHAM in *Lissenden v. C. A. V. Bosch, Ltd.* (22), and will probably now become unfashionable.

B I think that authority for the opposite view is to be found both in *Rice v. Reed* (13) and in *Hunter v. Prinsep* (14). In that case, the charterer had loaded a cargo of wood at Honduras for London, freight to be paid on delivery in London. The ship had an adventurous voyage, for, having been captured and recaptured, she was wrecked at St. Kitts.

C There the captain, without authority, obtained an order from the Vice-Admiralty Court for sale of the cargo, and the proceeds of sale were remitted to the shipowners. On being sued by the charterers for money had and received, they set up a cross-claim for freight *pro rata itineris*.

D It was contended by the shipowners that, by suing for money had and received, the plaintiffs had adopted and confirmed the act of the master, and had acquiesced, therefore, in preventing further conveyance and the earning of the full freight. However, LORD ELLENBOROUGH held, at p. 391 :

E "... the fallacy of the argument on the part of the defendants appears to us to consist in attributing more effect to the mere form of this action, than really belongs to it. In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint, with a view to damages, of the tortious act by which the goods were converted into money ; and takes to the net proceeds of the sale as the value of the goods.

He decided, therefore, that the shipowners were not excused for their
 F failure to deliver the goods, and were not entitled to the freight claimed. This decision, which applies to the case of the party from whom money had and received was claimed and whose tort was on the hypothesis waived, seems capable of application *a fortiori* to an independent wrong-doer.

G I think, therefore, that the defence of the bank fails on all grounds. I notice, however, that the judgment of the Court of Appeal gives to the members the comforting reflection that they have arrived at a decision which is not only right in law but also just in fact. I see no kind of injustice in the present result, which enables the plaintiffs to
 H recover a sum of money which, but for the want of ordinary care on the part of the bank officials, they would probably never have lost. I think that the appeal should be allowed, the judgment of GODDARD, J., set aside, and judgment entered for the plaintiffs, with costs here and below, for £1,900, together with such interest, if any, as the House shall decide to give them.

LORD THANKERTON : My Lords, I have had the privilege of reading and considering the opinions which have just been delivered, and I express my concurrence in them.

LORD ROMER : My Lords, I have had the privilege of reading beforehand the opinions which you have just heard of my noble and learned friends VISCOUNT SIMON, L.C., and LORD ATKIN. These opinions express so fully my own views regarding the questions to be decided on this appeal that I shall not, I trust, be thought guilty of any discourtesy to the judges in the courts below if I content myself with adding only a very few words of my own.

My Lords, if Emons had made a loan to M.F.G. Trust, Ltd., of the £1,900 now in question, purporting to act as the agent of the plaintiffs in the transaction, although having no authority in fact, the plaintiffs (assuming that they had power to make loans without security) could without question have ratified Emons's act. Speaking for myself, I think that they would, in those circumstances, have ratified it if, with full knowledge of the material facts, they had unequivocally sued M.F.G. Trust, Ltd., for the £1,900 as money lent. It would have been the ordinary case of a principal ratifying an act of his agent performed in excess of his authority. However, Emons never purported to make a loan of the money to M.F.G. Trust, Ltd., as the agent of the plaintiffs, or, for the matter of that, to make a loan of the money at all. Nor, when the plaintiffs sued M.F.G. Trust, Ltd., and subsequently lodged a proof for the money in the liquidation of that company, do they appear to have known the real facts relating to the dealing by Emons with the cheque for £1,900. Finally, they did not, either in the action or in the proof, claim the money as a loan unequivocally. In both cases, they added an alternative claim to the £1,900 as money had and received to their use. In these circumstances, the fact that the plaintiffs included in their writ against the M.F.G. Trust and in their subsequent proof in the liquidation of that company a claim to the £1,900 as money lent has no bearing whatsoever upon the only question to be determined upon this appeal, which is the question whether, by including in the writ and the proof a claim to that sum as money had and received to their use, the plaintiffs have precluded themselves from now claiming against the bank damages for the wrongful conversion of the cheque.

A person whose goods have been wrongfully converted by another has the choice of two remedies against the wrongdoer. He may sue for the proceeds of the conversion as money had and received to his use, or he may sue for the damages which he has sustained by the conversion. If he obtains judgment for the proceeds, it is certain that he is precluded from thereafter claiming damages for the conversion. In my opinion, however, this is due, not to his having waived the tort, but to his having finally elected to pursue one of his two alternative remedies. The phrase "waive the tort" is a picturesque one. It has a pleasing sound. Perhaps

it was for these reasons that it was regarded with so much affection by the old common lawyers, one of whom, indeed, was moved to break into verse upon the subject. However, with all respect to their memories, I firmly believe that the phrase was an inaccurate one if, and so far as, it meant that the tortious act was affirmed. What was waived by the
 A judgment was, not the tort, but the right to recover damages for the tort. As was said by LORD ELLENBOROUGH in *Hunter v. Prinsep* (14), at p. 391 :

In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint, *with a view to damages*, of the tortious
 B act by which the goods were converted into money ; and takes to the neat proceeds of the sale as the value of the goods . . .

The plaintiff in no way affirms the tortious act so as to treat it as having been a rightful one. As has been pointed out by VISCOUNT SIMON, L.C., the action of *assumpsit* would not lie if it were to be understood that no
 C tort had been committed. Before the Common Law Procedure Act, 1852, the plaintiff in his declaration would have averred a promise to pay the proceeds of the conversion and a breach of such promise. The promise could not, of course, be proved, because there was no such promise in fact. The promise would have been inferred from the
 D evidence showing that a tortious act had been committed. My Lords, I concur in the motion before the House.

LORD PORTER [read by LORD ROMER]: My Lords, in this case, United Australia, Ltd., appeal from an order of the Court of Appeal
 E affirming a judgment of GODDARD, J., in favour of the respondents. The substantial claim in that action was by the appellants against the respondents (i) for damages for wrongful conversion of a cheque for £1,900, dated Nov. 12, 1934, the property of the appellants, and (ii) alternatively, for the sum of £1,900 as money had and received by
 F the respondents to the use of the appellants. The history of the matter is shortly as follows. At the beginning of 1934, one Grimwade held, either in his own name or in the name of nominees, all the shares of the appellant company. The company had then no money and no banking account, but about that time Grimwade met one Gould, an undischarged
 G bankrupt, and determined with his help to try to resuscitate its fortunes. For that purpose, he decided to proceed to West Africa in order to endeavour to obtain or confirm for the plaintiff company certain concessions there. In order to effect his object, he obtained a power of attorney from the appellants on Apr. 25, 1934. At that time, one
 H Kent Jones, a nominee of Grimwade, was their chairman, but Grimwade seems to have thought that Gould would be a more energetic manager of the appellants' business in England, and before his departure he executed a joint and several power of attorney, dated Apr. 30, 1934, in favour of Gould and one C. E. Davies, a solicitor. He left England about May 2, 1934. Before his departure, one Emons, who was a clerk

of Gould's, was appointed a director and secretary of the appellant company. Gould held no official position with the appellants, except that at some time he appears to have been appointed accountant, but, after Grimwade's departure, their affairs in England were conducted by him without objection on the part of Kent Jones. Indeed, though not a director, Gould attended all the board meetings, apparently on the strength of the power of attorney granted to him by Grimwade. On July 17, 1934, another of Gould's employees, one Mangold, became a director of the appellant company. A

Meanwhile, certain options had been obtained giving the appellants mining rights in the Gold Coast Colony, and these rights were sold to Lower Ancobra (Gold Coast) Areas, Ltd., a public company promoted by Gould for the purpose of acquiring them. The price paid was £5,000. The liability of the Lower Ancobra company was met by sending 3 cheques to the appellants. The first cheque, dated June 30, 1934, for £1,200, was paid to the credit of the appellants with the National Provincial Bank, Ltd., with whom they had opened an account. The second cheque, for £1,900, was dated Oct. 25, 1934, and was treated in the same way, but the appellants drew a cheque for £1,750 on their account at the bank in favour of a company known as M.F.G. Trust, Ltd. This company was a trust operated nominally for the benefit of Mrs. Gould, whose initials were M.F.G. Of that company Emons was both director and secretary. The third cheque, dated Nov. 12, 1934, for £1,900, was indorsed as follows : B C D

Pay to order of the M.F.G. Trust, Ltd., for and on behalf of United Australia, Ltd., A. H. Emons, Secretary. E

The cheque so indorsed was paid to the account of M.F.G. Trust, Ltd., with the respondent bank, and the proceeds were collected by them as bankers for M.F.G. Trust, Ltd. The respondents' cashier appears to have had some doubts as to paying a cheque drawn in favour of one company to the account of another, and it seems that they had information which should have indicated to them that Emons was interested in both companies. In these circumstances, the cashier referred the cheque to the manager, but the manager made no inquiries, and authorised the collection of the cheque for M.F.G. Trust, Ltd. It is common ground that Emons had no authority to deal with the cheque as he did, and that both M.F.G. Trust, Ltd., and the bank were at that stage guilty of its conversion, unless the bank were protected by the Bills of Exchange Act, 1882, s. 82, together with the Bills of Exchange (Crossed Cheques) Act, 1906. F G

By their defence, the bank relied upon the provisions of these Acts, but, as the onus was upon them to prove that they had acted in good faith and without negligence, and as they called no evidence, no reliance could be placed by them upon this plea. Neither the receipt nor the indorsement of the cheque was reported to the appellants' board. H

On Feb. 3, 1935, Grimwade returned to this country. On Feb. 21,

- Gould was dismissed from his office as accountant, and in Mar., 1935, it was ascertained from the bank pass-book that the cheque for £1,750 had been drawn, but, as Gould's employees refused to give up the rest of the books of the company, which were in their possession, nothing was known of the cheque for £1,900. At an extraordinary general meeting
- A held on Apr. 10, 1935, Emons and Mangold were removed from their directorships, and the former ceased to be secretary. It was not, however, until May 9, 1935, that the ledger was recovered and the payment of the sum of £1,900 to M.F.G. Trust, Ltd., ascertained. The entries showed both the £1,750 and the £1,900 as loans, and appear to have
- B been made on the instructions of Emons, Mangold or Gould, but the date at which they were made could not be ascertained. On May 13, 1935, a writ was issued against M.F.G. Trust, Ltd., for these two sums as money lent, or, alternatively, as money had and received to the use of the appellants. At that time, the appellants had no knowledge of the form
- C in which the sum of £1,900 had reached M.F.G. Trust, Ltd., and, accordingly, described it as cash. On May 22, 1935, judgment was obtained by the appellants in default of appearance, but on the next day M.F.G. Trust, Ltd., entered an appearance and applied to set aside the judgment. On this application, Emons made an affidavit stating that none
- D of the money was lent by the appellants to M.F.G. Trust, Ltd., and also stating that on Nov. 12, 1934, a cheque drawn in favour of the plaintiff company for £1,900 was indorsed over by him as secretary of the plaintiff company to the defendant company. On this application, the judgment was set aside and the M.F.G. Trust, Ltd., permitted to defend. Their
- E defence was delivered on June 22, 1935, and denied the loan and the receipt of either sum for the use of the appellant.

On Oct. 25, 1935, a winding up order was made against M.F.G. Trust, Ltd., on the petition of other creditors, with the result that the action was automatically stayed. On Dec. 10, 1935, in the winding up, the

F appellants lodged a proof of debt alleging that M.F.G. Trust, Ltd., were indebted to them in the two sums as money lent or money had and received. From these facts, it appears that the appellants did not know of the existence of the cheque for £1,900 until they saw the affidavit of Emons, dated May 25, 1935, and the exact form of the cheque or of

G its indorsements does not appear to have been ascertained by them until they were shown a copy of it by their solicitor in June. No evidence was given tending to show that, either at that time or when they lodged their proof of debt, any circumstances had been brought to their attention upon which they could found a plea that the bank

H had acted either negligently or not in good faith. M.F.G. Trust, Ltd., proved to be without assets, and, following the usual practice in such cases, the Official Receiver neither admitted the debt nor even troubled to consider the alleged liability of the company towards those who had lodged proofs in the liquidation.

The appellants, having, for these reasons, been unable to obtain any

redress from M.F.G. Trust, Ltd., began the present action by writ dated Nov. 8, 1937, against the respondents, claiming (i) damages for wrongful conversion of the cheque for £1,900, or alternatively, (ii) money had and received by the defendants for the use of the plaintiffs. Besides pleading the Bills of Exchange Acts, the respondents, by para. 4 of their amended defence, pleaded as follows :

In the further alternative if, which is denied, the said Emons was not authorised to indorse the said cheque as aforesaid the defendants will contend that in so indorsing the same the said Emons purported to act as the plaintiffs' agent and the plaintiffs subsequently with full knowledge of all material facts ratified his said act by electing to adopt the payment to M.F.G. Trust as a loan from the plaintiffs by suing for and recovering judgment for the same and by proving in the liquidation of the said trust for the amount thereof.

On its face, this plea is an allegation of the ratification by the appellants of the act of their agent Emons with full knowledge of all the material facts. It was proved, however, that Emons was not authorised to indorse the cheque, and, in default of explanation or excuse, the indorsement and handing over of a cheque without consideration would plainly be *ultra vires* the appellant company, and, therefore, could not be ratified by them. The substantial argument put before the court of first instance and the Court of Appeal, however, was based, not upon ratification in the strict sense of the term, but upon the allegation that by suing the M.F.G. Trust for debt, or, alternatively, for money had and received, the appellants had waived the tort and chosen to proceed in contract, and could not thereafter sue the respondents. The argument was, and must be, I think, put in the following way. By suing either for money lent or for money had and received the appellants treated Emons as their agent to pay the money to M.F.G. Trust, Ltd., and treated M.F.G. Trust, Ltd., as having rightfully received the money on their behalf. If, then, the money was rightfully received by M.F.G. Trust, Ltd., the bank could not be treated as having wrongfully collected it on their behalf, nor could they be sued for money had and received when they had dealt with it in accordance with the instructions of the plaintiff's agent. The judge of first instance and the Court of Appeal accepted the respondents' argument. The judge, however, appears to have founded his decision upon the ground that, as the writ contained a claim for money lent, the action could only be brought on the footing that whosoever handed the money to the M.F.G. Trust, Ltd., was acting with authority. He seems to have been doubtful whether an action for money had and received would have barred the plaintiffs' claim. In reaching this conclusion, I think that he overlooked the fact that, if an action is brought for money lent, or, alternatively, for money had and received, it cannot be said that the plaintiff has elected to sue for money lent. He still leaves open his right to rely solely upon the action for money had and received and to disregard the claim for money lent, just as, in a case where an action is brought for conversion, or, alternatively, for money had and received, the plaintiff cannot be said, at any rate

until judgment, to have elected between the two remedies: *Rice v. Reed* (13), at p. 65. The Court of Appeal appear to have recognised this difficulty, and, therefore, to have based their decision upon the proposition that the appellants, by suing for money had and received, had finally elected to waive the tort, and thereafter could not sue either

A M.F.G. Trust, Ltd., or any other converter of the cheque in respect of the conversion. The decision rests, I think, upon a purely technical ground, and goes back to the principles established at a time when remedies given to the plaintiffs depended upon their ability to find a form of writ upon which their claim could rest. The action of *assumpsit* seems to

B have come into common use about the reign of Queen Elizabeth. In 1601, in *Slade's Case* (16), such an action was held to lie upon a simple contract, though an action in debt would have lain for the same obligation. In that case, it was determined that, where the register has two writs, it was the parties' election to take either, but that a recovery or

C bar in an action on the case was a bar in an action of debt, and *vice versa*. The ground of the decision appears to be that the party is put to his election, but, though the case decides that the recovery or bar in the one case is a bar to the other action, the exact moment at which the choice of one form of action bars a subsequent reliance upon the

D other is left at large. Whatever the reasoning upon which *Slade's Case* (16) is founded, and whether or not it decided that, where the alternative forms of action were each contractual, no election had finally been taken until judgment or recovery, the position in a case where an action could be brought either in *assumpsit* or alternatively in trover

E was somewhat different. In *Dalston v. Janson* (23), it was held that *assumpsit* on a custom of the realm and trover could not be joined because "*assumpsit* is *quasi ex contractu* and a contract and tort cannot be joined," and the pleas in both are not the same. An earlier decision in *Matthews v. Hopkin* (24) determined that on this ground a count against

F a carrier on the custom of the realm could not be joined with a count in trover.

The tendency of the courts, however, was to mitigate the strictness of this rule, and in *Dickson v. Clifton* (25) WILMOT, C.J., held that counts on the custom of the realm and trover could be joined where the same

G judgment could be given on both counts. He said, at p. 321:

It is objected that the first count is laid *quasi ex contractu*, and cannot be joined with trover; supposing it was so, yet I should lay no great stress upon old cases to this point at this day; but I think the first count is laid to be *ex delicto* of the defendant, and as a misfeasance, which may undoubtedly be joined with trover. The true test to try whether two counts can be joined in the same declaration, is to consider and see whether there be the same judgment in both, and not whether

H they both require the same plea, and wherever there is the same judgment in both, I think they may well be joined. I own that in many books it is reported that trover and a count against a common carrier cannot be joined, but common experience and practice is now to the contrary . . .

In *Mast v. Goodson* (26), BLACKSTONE, J., said that originally all actions on the case were for torts [p. 849]:

. . . till the introduction of *assumpsits* on *mutuatus* and other debts, in the time of

Queen Elizabeth [*Slade's Case* (16)] . . . Since that introduction, we must distinguish whether the particular action on the case before the court is founded on tort, or on contract ; if the former, it may be joined with any tort ; if the latter, with any contract.

In that case, the action was brought on a special agreement to permit the plaintiff to land coals on the defendants' wharf, with an action in trover for coals detained, and it was held that both actions were founded on tort, and might be joined in one action. So, too, in *Brown v. Dixon* (27), where a count for trover and a count on the case for breach of an express or implied promise were joined, it was held by BULLER, J., that in both counts the action was upon the case, that the same plea of " Not guilty " went to the whole declaration, and that the court might give the same judgment on the whole. At the same time, he repeated that *assumpsit* and tort could not be joined together, adding, at p. 277 :

The common way of declaring against a carrier now is in *assumpsit*, to which trover cannot be joined : but if the plaintiff declare on the custom of the realm, a count in trover may be joined ; it only depends on the form of the action.

It appears, therefore, that the original ground of objection to pleading in *assumpsit* and in tort in the same action was that counts in these two forms could not be joined, but that the plaintiff had his election and could sue in tort or affirm the tortious act and thereby preclude himself from so suing. The questions, however, have still to be decided (i) what amounted to such an affirmation, (ii) how far the strictness of the original doctrine remains in force to-day, and (iii) how far an election to proceed in *indebitatus assumpsit* against one defendant precluded or precludes the plaintiff from suing another and independent defendant in tort, or for money had and received. Certainly it has always been held that the plaintiff may affirm a tort and preclude himself from suing the same party by accepting in full discharge the proceeds obtained by the tortious dealing with the plaintiffs' property. Such cases as *Wilson v. Poulter* (28), *Brewer v. Sparrow* (11) and *Lythgoe v. Vernon* (29) are examples of this principle. On the other hand, where the proceeds are received by the plaintiff but not accepted in full discharge, he may still sue for the original wrong : *Burn v. Morris* (30), *Valpy v. Sanders* (10) and *Davis v. Petrie* (31). However, these are instances of a plaintiff electing to receive something in satisfaction of his claim, and thereby precluding himself from denying that he has obtained his chosen remedy.

In the present case, the suggested affirmance is (a) by the bringing of an action in *assumpsit* against M.F.G. Trust, Ltd., and (b) by lodging a proof in the winding up of that company. As to (a), it is said, on the strength of *Smith v. Baker* (7), that the mere issue of the writ is a final affirmance of the act of Emons in indorsing the cheque and of M.F.G. Trust, Ltd., in receiving it, and that, by electing so to affirm Emons's action, the plaintiffs were afterwards precluded from suing in trover. It is true that in that case BOVILL, C.J., said, at p. 355 :

But if an action for money had and received is so brought, that is in point of law a conclusive election to waive the tort ; and so the commencement of an action of trespass or trover is a conclusive election the other way.

In that case, however, it was admitted by the plaintiff's counsel in opening that the bringing of an action and the recovery of the sum claimed would be a waiver of the tort so as to preclude any further action, and, at the end of the argument on his behalf, his counsel further admitted that it would obviously be unjust that, after bringing an action for money had and received, which involves the assumption that the plaintiff authorised the sale, the plaintiff should bring a fresh action of trover. Moreover, KEATING, J., at one time said that it was admitted by the plaintiff's counsel that, if the plaintiff had brought an action for money had and received, that would amount to a conclusive election to waive the tort, and throughout does not appear to have drawn any distinction between bringing an action, judgment and recovery. The facts established were that the plaintiff had proved in the defendant's bankruptcy and received the proceeds of the sale of the defendant's property. The court held that this was a final election, and, as I understand them, held that in such a case the question whether or not the tort had been waived was one of fact. In these circumstances, the statement of BOVILL, C.J., was plainly *obiter*, and the third member of the court, HONYMAN, J., appears to have founded his decision upon the ground that the plaintiff had obtained some advantage to which he would only have been entitled on the footing that the defendant's action was valid, and that, having obtained that advantage, he could not afterwards say that the defendant's action was void. He went on to add, it is true, that the only footing on which the plaintiff could recover in an action for money had and received was by waiving the tort and treating the defendant as his agent. Of course, if the mere bringing of the action is a final election to treat the wrongdoer as the plaintiff's agent in the full sense of that term, it would be difficult logically afterwards to sue him for the wrong he had committed, but the agency is a notional one, and the objection depends on the extent to which that notional idea is to be carried.

The ground upon which an action in *assumpsit* has often been said to be based is upon an implied promise. Indeed, in *Moses v. Macferlan* (32), LORD MANSFIELD, C.J., said that, in all cases where *ex æquo et bono* the defendant ought to hand over money, the law will imply a promise. The generality of this statement did not find universal acceptance, and in cases such as *Marriot v. Hampton* (33) it was held that such a promise would not be implied in every case of that kind. The general principle is set out by LORD SUMNER in *Sinclair v. Brougham* (4), at p. 452 :

All these causes of action are common species of the genus *assumpsit*. All now rest, and have long rested, upon a notional or imputed promise to repay.

Whether or not this statement is true in all cases, it still has to be remembered that no such promise was ever in fact made. It is notional or imputed, and, before one is obliged to hold that an action upon such a fictional promise makes the wrongdoer the plaintiff's agent so as to

bind him by his acts, and precludes any reliance upon the wrong, one has to determine whether the fictional promise has the same effect as if it had actually been made.

In *Hunter v. Prinsep* (14), the master of a ship had wrongfully sold the goods of certain shippers and so converted them. The shippers sued in *assumpsit* without allowing freight, and were held to be entitled to recover the whole proceeds as money had and received to their use, although it was contended that by adopting this form of action they had affirmed the sale and were liable for freight *pro rata itineris* as upon a right delivery of the goods at the place of sale. LORD ELLENBOROUGH said, at p. 391 :

It was contended on the part of the defendants, that the money for which the goods sold is a substitution for, and properly represents, the goods themselves : and that as the defendants would, if the goods had subsisted *in specie*, have had a lien upon them for their freight, and would be entitled to have carried them if they could in the same ship, or to have hired another for that purpose, and so to have earned their full freight : or, if the plaintiff had taken them out of their hands before the voyage was completed, would have been entitled to have claimed freight *pro rata itineris* against him : so, now, the plaintiff, having sued for the proceeds in this form of action "for money had and received," has, in virtue of his so suing, adopted and confirmed the act of the master, by which the goods were converted into money, by which the further conveyance of them in the course of the voyage was prevented, and by which of course the full freight of them was prevented from being earned. But the fallacy of the argument on the part of the defendants appears to us to consist in attributing more effect to the mere form of this action than really belongs to it. In bringing an action for money had and received, instead of trover, the plaintiff does no more than waive any complaint, with a view to damages, of the tortious act by which the goods were converted into money ; and takes to the neat proceeds of the sale as the value of the goods ; subject of course to all the consequences of considering the demand in question as a debt, and, amongst others, to that of the defendants' having a right of set-off if they should happen to have any counter demand against the plaintiff.

So, too, in *Dalton v. Whittem* (34), a case in which the plaintiff sued in *assumpsit* for the value of severed fixtures and the defendant pleaded that the bringing of an action in this form justified the severance, COLERIDGE, J., said, at p. 966 :

It is like the case of money had and received where the plaintiff's goods have been wrongfully taken and sold. The action, to a certain extent, assumes the legality of the sale : but still the plaintiff may say that the property was not in the vendor. The sale is, as it were, protested.

I quote these cases to show that the notional contract created between the parties was recognised as fictional, and must not be pressed too far. In one of the earliest cases dealing with waiver of the tort of conversion, *Lamine v. Dorrell* (3), HOLT, C.J., suggests that nothing short of recovery in an action for money had and received may be a bar to an action in trover. He said, at p. 1217 :

If an action of trover should be brought by the plaintiff for these debentures after judgment in this *indebitatus assumpsit*, he may plead this recovery in bar of the action of trover in the same manner as it would have been a good plea in bar for the defendant to have pleaded to the action of trover, that he sold the debentures, and paid to the plaintiff in satisfaction. But it may be a doubt if this recovery can be pleaded before execution. This recovery may be given in evidence upon not guilty in the action of trover, because by this action the plaintiff makes and affirms the act of the defendant in the sale of the debentures to be lawful, and consequently the sale of them is no conversion.

Again, in *Hitchin v. Campbell* (8), the assignees of a bankrupt sued a creditor who had levied his debt by *fi. fa.* after the act of bankruptcy. The assignees first sued the sheriff and the creditor in trover, but a verdict was found for the defendants and judgment given accordingly. The assignees subsequently sued the defendant in *assumpsit* for the sum of £2,155 6s. 5d., the value at which the sheriff had made a bill of sale to the defendant of the bankrupt's goods. To this claim the defendant pleaded, amongst other defences, that the plaintiff, having made his election by bringing trover in the King's Bench, in which he failed, was barred thereby from bringing another suit for the same cause of action. As to this contention, DE GREY, C.J., giving the judgment of the court, said, at p. 830 :

Another, and a much stronger objection taken, was, that though the assignees may have their election to bring either an action of tort or contract, yet they cannot bring both; and, having elected to bring trover, the judgment in that bars the action of *assumpsit*. This depends upon two considerations :—(1) Whether a man's having once elected to proceed upon the tort bars him from proceeding upon the contract. (2) Whether his proceeding down to judgment does not bar him from trying the same cause of action again. (1) As to the first : cases have been cited to shew, that, where there are two different kinds of remedies, real and personal, or otherwise specifically distinguished, a man's election of one prevents him from using the other. He may distrain, or bring assize, but not both ; Litt. s. 588 :—may bring writ of annuity, or distrain, s. 219 ; and his election is determined, even though he should not recover after he hath counted thereon ; Co. Litt. 145a. But where both remedies are merely real, or merely personal, there the election is not determined till the judgment on the merits. For a non-suit on an action of account is no bar to an action of debt ; Co. Litt. 146a. And so must HOLT, in 12 Mod. 324, be understood to mean, " that, if they bring one, they shall not afterwards bring the other," i.e., if the first be brought to a due conclusion. (2) But in the present case the action of trover went on to a verdict and judgment, and appears, by the case stated, to have been for the same cause of action. And upon this it is, that the opinion of the court is founded. The rule of law is, *nemo debet bis vexari pro eadem causa*.

The case sets out what was the common law principle—namely, that, if there are two different kinds of remedy, such as real and personal action, the plaintiff must elect which he will pursue, but, if they are of the same kind, then he need not elect. Tort and *assumpsit* are both personal actions, and, therefore, there should be no need of election. Nor would the mere bringing of one bar a subsequent action of the other kind. The decision rests upon the fact that the case was carried to judgment, not upon any doctrine of election.

Finally, in *Hamblly v. Trott* (35), where an executor was unsuccessfully sued in trover on the ground that *actio personalis moritur cum personâ*, LORD MANSFIELD does not seem to have thought the bringing of the suit was a final election, as a result of which the plaintiff would be barred from suing in *indebitatus assumpsit*. He says, at p. 377 :

... upon principles of civil obligation, another form of action may be brought, as an action for money had and received.

No doubt it has been a common formula to state in cases of conversion that a plaintiff may bring an action in *assumpsit* for the proceeds of the thing converted and waive the tort. *King v. Leith* (17) and *Smith v. Hodson* (36) may be given as examples, and, in spite of the

decision in *Hitchin v. Campbell* (8), the courts have been accustomed to regard the actions of tort and *indebitatus assumpsit* as alternative, and not as complementary. As was said by LORD KENYON in the leading case of *Smith v. Hodson* (36), at p. 217:

Now here the assignees, by bringing this action on the contract, recognised the act of the bankrupt, and must be bound by the transaction in the same manner as the bankrupt himself would have been . . . A

However, I do not think that, in the statements made in the various courts which decided these and similar cases, the judges who were parties to the decisions had before their minds the stage at which the election to affirm the action of the tortfeasor became final. Certainly in none of these cases was it necessary to determine that the mere bringing of an action was enough. The only definite assertion to that effect is, as I have said, in *Smith v. Baker* (7), but even in that case the *dictum* of BOVILL, C.J., was founded upon the analogy of *Buckland v. Johnson* (12), which was a case of joint conversion, and the real ground of the latter decision was that a verdict and judgment against one joint tortfeasor was a bar to a recovery against another. In that case, JERVIS, C.J., thought, but thought wrongly, that a judgment in trover transferred the goods from the plaintiff to the defendant. It is now plain that nothing short of satisfaction effects such a transfer. However, even if JERVIS, C.J., had been right, it was the judgment, and not the bringing of the action, which barred the claim. B
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The result of the cases is, I think, by no means decisive, nor is it clear that the mere issue of a writ is a final election on the part of the plaintiff to forgo his right to sue in tort even where the second action is brought against the same defendant. As has been pointed out, even in such cases there is much to be said in principle and authority against such a conclusion. It is not necessary, however, having regard to the view which I express later, finally to determine whether or not the *dictum* of BOVILL, C.J., can be supported. Nor do I think that the mere lodging of a proof in bankruptcy is a final election on the part of the plaintiff to waive the tort. Indeed, *Rice v. Reed* (13) seems to me to be authority to the contrary, and even *Smith v. Baker* (7) recognises that proceedings in bankruptcy are not to be treated as equivalent to the bringing of an action, and points out that the question whether or not the steps taken in those proceedings are a final election is a question of fact dependent upon the evidence. If, as in *Morris v. Robinson* (9), a demand from a Vice-Admiralty Court for money received by it from the tortious sale of goods is not a bar to a subsequent action in trover, I find it difficult to think that the mere lodging of a proof in bankruptcy is evidence of a final election. E
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So far, I have been considering the question whether the bringing of an action for money had and received is a waiver of the right to bring an action in tort against the same defendant, and have pointed out that the allegation in *Smith v. Baker* (7) to the effect that it was, is at least open

to considerable doubt. However, let me assume that where an action is brought against a defendant the issue of the writ finally determines the right of the plaintiff against that defendant and is a bar to an action against him in *assumpsit* or tort founded upon the same facts. The question still remains whether or not such a proceeding is also a bar to the bringing of an action in either of these two forms against another defendant. That is, if there are two separate tortfeasors who have committed separate torts in respect of the same property and the plaintiff elects to sue one in *indubitatus assumpsit*, is he precluded from thereafter suing the other either in tort or for money had and received? This is the problem posed, but not solved, by LORD HALDANE in *John v. Dodwell & Co.* (37), at p. 570.

It is plain that an action against one such separate tortfeasor for conversion is no bar to an action against another, nor, indeed, does the signing of judgment against the first end the matter. The plaintiff can even then proceed to judgment against the second, and his rights are not exhausted until from one or both he has obtained the full measure of his loss. If the option be an option to sue in one form or the other, *prima facie* an action for money had and received against one tortfeasor should be no bar to an action in the same form against another, since the plaintiff, by waiving the tort in the one case, even if he be held to have waived the tort in the other case, would still have an action in contract left to him in each. Indeed, as I have said, the only way in which the argument could succeed would be by saying that the action for money had and received recognised the tortious act as done by the plaintiffs' authority, and, by applying this allegation to the facts of the present case, to say that the plaintiffs, by suing M.F.G. Trust, Ltd., for money had and received, affirmed the act of Emons in indorsing the cheque in favour of that company, and thereby affirmed the act of the bank in collecting the proceeds of the cheque for the company to which it was indorsed. Some support for this proposition is to be found in *Hovil v. Pack* (38). The facts are not of much assistance, but LORD ELENBOROUGH, C.J., said, at p. 166:

If you adopt *De Beaume* as your agent on your own behalf, you must adopt him throughout, and take his agency *cum onere*. Your action, if any, must be against *De Beaume*: but it is impossible you can follow the money into the hands of the defendant, to whom it has been paid by your adopted agent. If this could be done, by the same rule you might follow it still further through other hands. But if the defendants had paid it over to another, could you pretend to have the same right to follow it?

This opinion, however, was his alone. LAWRENCE, J., and LE BLANC, J., founded their concurrence on no such general proposition, but on the fact that, in the case which they were considering, the money sought to be recovered was not the proceeds of any property of the plaintiff, but had been received from a third party. Nor do I think that support for the argument can be obtained from *Verschuere Creameries v. Hull & Nederlands S.S. Co.* (15), a case in which goods had been mistakenly

delivered by forwarding agents to certain customers of the plaintiffs, and the plaintiffs had afterwards invoiced the goods to the customer and recovered judgment against him. Both BANKES and SCRUTTON, L.JJ., spoke of the inability to approbate and reprobate, and BANKES, L.J., said, at p. 611 :

Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. A

However, the case was obviously one where the defendants were purporting to act as agents for the plaintiffs in handing over the goods, and is an example of true ratification. As it is put by ATKIN, L.J., at p. 612 : B

. . . they affirmed and ratified the act of the forwarding agents. Having done that they cannot afterwards sue the agents as having acted in breach of their mandate.

It is a case in which agents acted in the mistaken belief that they had authority and the principals afterwards ratified the authority which the agents thought they had. No question of notional or implied contract, or, as it is called, quasi-contract, arose. C

Where, however, the fiction of a contract has to be resorted to, the same principles are not necessarily applicable. The question then is to what extent the fiction must be carried. In *Davis v. Petrie* (31), the trustee under a deed of assignment, which was also an act of bankruptcy, received from the defendant a debt due from her to the assignor. The assignor was afterwards made bankrupt, and the plaintiff was appointed trustee in the bankruptcy, and received from the trustee under the deed about one-fifth of the money collected by him. He then sued the defendant for the original debt, and in answer she pleaded that, by receiving money from the trustee under the deed, the trustee in bankruptcy had affirmed the action of the former in collecting money from those indebted to the bankrupt, and could not afterwards sue them in respect of their debts. COLLINS, M.R., refused to treat the action of the plaintiff in receiving the money from the trustee under the deed as an election to affirm his acts. If the defendant could have proved that her money had reached the trustee, such proof, it was true, would have been a defence, *pro tanto*, against a claim in debt against her, but, short of such proof, there was no defence to the action. FLETCHER MOULTON and FARWELL, L.JJ., gave judgment to the same effect. D
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Even if, at the time when *indebitatus assumpsit* first came into favour, the courts had felt themselves bound to hold that, because a count in such an action could not be joined with a count for trover (because tort and contract could not be dealt with in the same action) and that, therefore, a plaintiff, in choosing one form of action or the other, must be taken finally to have exercised an election between the alternate remedies open to him, yet it does not follow that the same principle would apply to-day. Forms of action were abolished by the Common Law Procedure Act, 1852, and the Judicature Act, 1875, empowered H

all courts to apply the principles of law and equity alike in all courts, and provided that, in case of conflict, the principles of equity should prevail. In these circumstances, there seems little reason why the court should feel itself hidebound by matters which concern form and not substance, fiction and not reality. This view is expressed by
 A PICKFORD, L.J., in *Maskell v. Horner* (39), at pp. 126, 127 :

The point taken on behalf of the defendant was that as distress was the legal remedy for non-payment of tolls, a threat to distrain was like a threat to bring an action, and a payment made in consequence of it could not be recovered back in an action for money had and received. In support of this contention, *Knibbs v. Hall* (40), *Lindon v. Hooper* (41) and *Gulliver v. Cosens* (42) were cited. I do not think these cases support the proposition. So far as they are not decisions upon
 B points of pleading and forms of action not now material they only decide that in the case where there is a right to distrain but a complaint that there was a distress for too much, replevin and not money had and received is the proper remedy.

The reference to points of pleading and forms of action not now material is as applicable to cases of *assumpsit* and waiver of tort as it is to those
 C cases mentioned by PICKFORD, L.J.

The fiction forming the basis of the action of *assumpsit* may be an implied promise, but the substance is the right of the plaintiff to recover property or its proceeds from one who has wrongfully received them, and, if the realities of the matter are kept in mind, I see no reason why
 D the party deprived of his property should be precluded from suing a second wrongdoer, either in trover or for money had and received, because he had previously sued another wrongdoer in *assumpsit*, nor do I see any difference in substance between a case where the plaintiff
 E sues successive wrongdoers in conversion (in which he can admittedly recover judgment against each) and a case in which he proceeds against the first defendant in *assumpsit*, and not trover. It will be observed that this conclusion leaves undetermined the extent to which a plaintiff choosing between trover and *assumpsit* is bound by an election when the whole of the facts were not before him when his choice was made.

The respondents argued that, if one elects to sue in *assumpsit*, one elects to subject oneself to all the incidents of one's choice, including the possibility that one thereby waives a tort committed by another tortfeasor in respect of the same property. The appellant argued that,
 F in this and in all other cases of election, no binding choice is made unless all the material facts are present to the mind of the person upon whom
 G the obligation to elect falls. No decision as to these arguments is necessary, having regard to the views I have expressed, and I do not find myself compelled to pronounce between them. For the other reasons which I have set out, I think that the appeal should be allowed.

H *Appeal allowed with costs.*

Solicitors: *A. King-Hamilton* (for the appellants); *Durrant Cooper & Hambling* (for the respondents).

Re MILKING PAIL FARM TRUSTS, ROBINSON v. TUCKER.[CHANCERY DIVISION (Farwell, J.), **July 24, 1940.**]

Limitation of Actions—Land held in undivided shares before 1926—Mortgage—Statutory trusts—Proceeds of sale—Whether claim of mortgagees barred—Real Property Limitation Act, 1874 (c. 57), s. 8—Law of Property Act, 1925 (c. 20), s. 35, Sched. I, Part IV, para. 1 (4).

In 1921, G. R. mortgaged his interests in remainder under the will of E. W. and in expectancy under the will of C. W. in certain freehold land held in undivided shares. Nothing was ever paid in respect of principal or interest. In 1922, G. R. became bankrupt and died in 1930 intestate and an undischarged bankrupt. The mortgagees did not prove in the bankruptcy but relied on their security. C. W. died in 1923, and thereupon the whole interest in the land vested in G. R., the mortgagor, but as no assent or conveyance was made or given in respect of the entirety or any share in the land before Jan. 1, 1926, it vested in the Public Trustee upon the statutory trusts applicable to land held in undivided shares by virtue of the Law of Property Act, 1925, Sched. I, Part IV, para. 1 (4). By a deed dated Feb. 11, 1939, the plaintiffs were appointed trustees in place of the Public Trustee for the purposes of the statutory trusts affecting the land and subsequently sold it for a little over £2,000, which was less than the amount owing under the mortgage. It was contended that the mortgagees' claim to the proceeds of sale was barred by the Real Property Limitation Act, 1874, s. 8:—

HELD: there was no statutory limitation to bar the claim of the mortgagees, for whom, as from Jan. 1, 1926, the proceeds of sale were held on an express trust, and they were entitled to the whole of such proceeds of sale.

Re Landi, Giorgi v. Navani (1) followed.

EDITORIAL NOTE. It was decided in *Re Landi, Giorgi v. Navani* (1) that, as between persons who, before Jan. 1, 1926, the date of coming into operation of the Law of Property Act, 1925, were entitled to land in undivided shares, as from that date, no statute of limitations applied, since the proceeds of sale were then held on an express trust. It was contended that that decision was not relevant to this case, since here there was a dispute between mortgagor and mortgagee, but the court has rejected that contention on the express wording of the Law of Property Act, 1925, s. 35, which in terms includes an incumbrancer.

AS TO CO-OWNERS AND LIMITATION OF ACTIONS, see HALSBURY, Hailsham Edn., Vol. 20, pp. 711, 712, paras. 942-944; and FOR CASES, see DIGEST, Vol. 32, pp. 457-459, Nos. 1227-1253.]

Case referred to:

- (1) *Re Landi, Giorgi v. Navani*, [1939] Ch. 828; Digest Supp.; 108 L.J.Ch. 401; 161 L.T. 131; *sub nom. Re Landi, Giorgi v. Navani*, [1939] 3 All E.R. 569.

ADJOURNED SUMMONS to determine whether the mortgagees or the mortgagor's trustee in bankruptcy were entitled to the proceeds of sale of the property subject to the mortgage. The facts are fully set out in the judgment.

G. D. Johnston for the trustees.

A. G. Coulson for the personal representatives of Eliza and Charlotte Bromley Wickham.

Roger W. Turnbull for the mortgagor's trustee in bankruptcy.

F. McMullan for the mortgagees.

FARWELL, J. : Prior to 1912, three sisters, Miss Rebecca, Miss Eliza and Miss Charlotte Wickham, were entitled in undivided shares to certain freehold property in Kent. On Apr. 29, 1912, Rebecca Wickham died, having by her will left to her two sisters her share in the property for their respective lives and to the survivor of them for life, and after the death of the survivor to George Robinson. On Oct. 13, 1919, Eliza died, leaving her sister Charlotte the survivor of the three sisters, and Eliza also left to her sister Charlotte by her will a life interest in her share of the property, and after her death to George Robinson. During the lifetime of Charlotte Wickham, on Sept. 9, 1921, George Robinson mortgaged his interest in the property to mortgagees who were the trustees under the will of one Sarah Fulkes. That document, after reciting the title of George Robinson, proceeds as follows :

... and whereas the mortgagor hereby declares that he has not in any way charged or encumbered the shares and interest in the said hereditaments to which he is or may be entitled as aforesaid and whereas the mortgagor is indebted to the mortgagees in the sum of £3,000 or some lesser sum being moneys received by him on account of the mortgagees and belonging to them on a joint account and he has in consideration of the mortgagees not taking proceedings against him for the recovery thereof agreed to give to them such charge on his share and interest in the said hereditaments as is hereinafter contained . . . this indenture witnesseth . . . that in pursuance of the said agreement and in consideration of the premises the mortgagor doth hereby as beneficial owner charge all that his share and interest of and in the said hereditaments mentioned in the schedule hereto whether in possession reversion expectancy or otherwise with the payment to the mortgagees of the said sum of £3,000 or such lesser amount as may on taking accounts be found to be due from him together with interest on such amount at 6 per cent. as from Mar. 1, 1921, and this indenture also witnesseth that for the consideration aforesaid the mortgagor as beneficial owner doth hereby convey unto the mortgagees all that his aforesaid share of and in the said hereditaments to hold the same unto the mortgagees in fee simple.

Then there is a proviso for redemption.

On Dec. 20, 1922, George Robinson was declared a bankrupt, and he ultimately died an undischarged bankrupt. On Apr. 14, 1923, Charlotte died. Letters of administration of the estate of Charlotte were issued to one Charles Henry Bertenshaw. In the bankruptcy of George Robinson, the mortgagees did not prove. They were content to rely upon their security. The proceedings to administer the estate of Eliza were commenced in this court, and also proceedings to administer the estate of Charlotte. It is not disputed that no assent or conveyance was made or given in respect of the entirety or either moiety of the land prior to Jan. 1, 1926, and, therefore, on Jan. 1, 1926, when the Law of Property Act, 1925, came into operation, the entirety in fee simple vested on such date in the Public Trustee upon the statutory trusts. However, the Public Trustee was never requested to act in, and never accepted, those trusts, and by a deed, dated Feb. 11, 1939, made between John Lincoln Robinson and Charles Henry Bertenshaw of the first part, the trustee of the property of George Robinson, a bankrupt, of the second part, and the plaintiffs of the third part, the plaintiffs were appointed to be the trustees of the lands in place of the Public Trustee for all the purposes of the statutory trusts. The plaintiffs have recently

sold the lands under the trusts for sale, and they hold a sum of a little over £2,000, being the proceeds of sale of such lands. The question which I now have to determine is whether that sum, which is admittedly less than sufficient to pay in full the amount due under the mortgage, is payable to the mortgagees, or whether, as the trustee in bankruptcy contends, the mortgage is barred under the Real Property Limitation Act, 1874, s. 8, and, accordingly, the mortgagees can make no claim on the money, and the money, therefore, must be paid to the trustee in bankruptcy. It is admitted that no part of the principal or interest has ever been paid under the mortgage, and it is said, therefore, that the Real Property Limitation Act, 1874, s. 8, applies, and that the mortgage is now barred. A

The Real Property Limitation Act, 1874, s. 8, provides as follows :

No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within 12 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent . . . C

It was contended that, although it was admitted that no part of the capital and no interest had been paid on the mortgage, there had been an acknowledgment sufficient to take the case out of the statute. The question whether or not that was a sufficient acknowledgment is open to very considerable doubt, but it is not necessary for me to decide that question, because, in my judgment, on another ground the mortgagees are entitled to the money in question, and their mortgage is still a subsisting mortgage. The ground upon which that is founded is this. Immediately upon the Law of Property Act, 1925, coming into operation on Jan. 1, 1926, the property in question became vested in the Public Trustee, and, as soon as the other trustees were appointed, in those trustees, on the trusts stated in the Law of Property Act, 1925, s. 35, as follows : D

. . . upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs, and of the net rents and profits until sale after payment of rates, taxes, costs of insurance, repairs, and other outgoings, upon such trusts, and subject to such powers and provisions, as may be requisite for giving effect to the rights of the persons (including an incumbrancer of a former undivided share or whose incumbrance is not secured by a legal mortgage) interested in the land. E

The effect of that section has been recently considered in the Court of Appeal in *Re Landi, Giorgi v. Navani* (1), and the effect of that decision is that, as between persons who, prior to the coming into operation of the Act, were entitled to land in undivided shares, as from Jan. 1, 1926, no Statute of Limitations applies at all, because the property in the proceeds of sale as from that date is held upon an express trust for such person, and, there being an express trust, no statute applies. It was further held that sect. 12 of the Act, which might be thought to lead H

to a contrary effect, did not operate so as to prevent the section from having that effect. It is said that, in the present case, that decision is not relevant, because here I am dealing with a case where the dispute is between mortgagor and mortgagee, and, in those circumstances, the statute applies, and runs against the mortgagee notwithstanding the alteration in the position effected by the Act of 1925. In my judgment, the answer to that contention is to be found in the precise language of the section itself. The section in terms includes an incumbrancer, and, in the face of that language, it seems to me quite impossible to say that the principle of the decision in *Re Landi, Giorgi v. Navani* (1) does not apply equally to the case with which I have to deal. In those circumstances, in my judgment, there is no statutory limitation to bar the mortgagees. The mortgagees have a good charge for a sum which is in excess, as everybody admits, of the amount which represents the proceeds of sale of the property, and, consequently, they are entitled to be paid the sum in question, and the trustees in bankruptcy's claim must be refused. I make a declaration to that effect.

Judgment for the mortgagees. Costs to be paid out of the fund prior to distribution.

Solicitors: Haslewood, Hare & Co., agents for Bassel & Boucher, Rochester (for the parties other than the mortgagees); Dollman & Pritchard, agents for Hayward, Smith & Mackey, Rochester (for the mortgagees).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

Re WILSON, HURTLEY AND ANOTHER v. MARIE CURIE HOSPITAL AND OTHERS.

[CHANCERY DIVISION (Bennett, J.), July 31, August 1, 1940.]

Executors—Legacies—Annuity—Direction to appropriate fund—Gift over of fund on death of annuitant—Rights of annuitant.

A testator gave an annuity of £200 for life, and directed that a sum should be set aside to provide by its income for the annuity, with power to resort to the capital of the appropriated fund should the income at any time be insufficient. Until such sum should be appropriated, the testator charged his residuary personal estate with the annuity. During the lifetime of the annuitant, any surplus income of the appropriated fund was to be applied in the same manner as income of the residuary estate, and, on her death, the fund, or so much thereof as remained, was to be divided equally between certain named charities. The testator also left certain pecuniary legacies. The estate proved insufficient to pay the legacies and the annuity in full, and a summons was taken out to determine on what principle the annuity should be abated. It was contended on behalf of the charities that there were provisions in the will which converted the annuity into a settled legacy, and that the proper course was to ascertain the sum required to produce the annuity, abate that, invest the abated sum and pay the income thereby produced to the annuitant:—

HELD: on the construction of the will, the annuity had not been converted into a settled legacy. The interests of the charities were

subject and subsidiary to the interest of the annuitant, and the correct principle was to value the annuity, to abate it proportionately with the pecuniary legacies, and to pay the abated value to the annuitant.

[EDITORIAL NOTE. In *Re Farmer, Nightingale v. Whybrow* (1) the facts of that case were distinguished from those in *Re Nicholson, Chadwyck-Healey v. Crawford* (2), but the judgment herein suggests that they are in substance the same. As opposite conclusions were reached in the two cases, and the decision in the present follows that in *Re Farmer, Nightingale v. Whybrow* (1), it would now seem that that decision is to be preferred. As the decision in *Re Nicholson, Chadwyck-Healey v. Crawford* (2) was a departure from the usual rule in administration, the result is to confirm the adoption of the general rule in such cases. A

AS TO ABATEMENT OF ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 358, 359, para. 669; and FOR CASES, see DIGEST, Vol. 23, pp. 420-423, Nos. 4913-4932.] B

Cases referred to :

- (1) *Re Farmer, Nightingale v. Whybrow*, [1939] Ch. 573; [1939] 1 All E.R. 319; Digest Supp.; 108 L.J.Ch. 197; 160 L.T. 59.
- (2) *Re Nicholson, Chadwyck-Healey v. Crawford*, [1938] 3 All E.R. 270; Digest Supp. C
- (3) *Re Carew, Channer v. Francklyn*, [1939] Ch. 794; [1939] 3 All E.R. 200; Digest Supp.; 108 L.J.Ch. 291; 161 L.T. 139.
- (4) *Re De Chassiron, Lloyds Bank, Ltd. v. Sharpe*, [1939] Ch. 934; [1939] 3 All E.R. 321; Digest Supp.; 161 L.T. 53. D

ADJOURNED SUMMONS to determine upon what principles an annuity directed to be paid out of an appropriated fund should be abated, there being a gift over upon the death of the annuitant of the fund, or so much of it as was left, and certain pecuniary legacies. The testator, James William Wilson, made his will on Apr. 3, 1931. He died on Mar. 3, 1938, and the will was proved on Oct. 26, 1938. The material provisions of the will are fully set out in the judgment. E

W. F. Waite for the plaintiffs, the executors,

Humphrey H. King for the first defendant.

W. T. Elverston for the second defendant, the annuitant. F

W. G. H. Cook for the third defendants, the General Infirmary at Leeds, representing the charities.

Meyrick J. L. Beebee for the fourth defendant, representing the pecuniary legatees.

H. O. Danckwerts for the Attorney-General. G

BENNETT, J. : This summons raises a question of administration. If there is a matter in regard to which it is desirable that there should be certainty, it is in regard to the rules which are to be applied in the administration of the estates of deceased persons. For myself, until I heard the argument in this case, I should have had little doubt as to what the answer to the first question raised by the summons should be. However, in the course of the argument, it appeared that there are two recent decisions, one of FARWELL, J., and one of CROSSMAN, J., both upon the exact point raised by this summons, and these two decisions cannot be reconciled. H

Therefore, I have to choose between them. The question is what method is to be applied in abating an annuity of £200 per annum which has been given by the will of this testator, James William Wilson, to Hilda Alice Palethorpe, the estate of the testator being insufficient to pay in full the pecuniary legacies and the annuities which he has bequeathed.

- A The general rule in such a case is clear and well-settled. If a testator has bequeathed annuities and pecuniary legacies, and his estate is insufficient to pay the annuities and the legacies in full, the annuities have to be valued. The values are treated as legacies, and abate proportionately with the pecuniary legacies. The annuitants are
- B entitled, unless they are married women restrained from anticipation, to have the abated values of their annuities paid to them. If the annuitant is a married woman restrained from anticipation, the rule is that the abated value is laid out by the executors or trustees in the purchase of an annuity for the married woman. In this case, it is said
- C that the general rule is not to be applied, because there are some provisions in the will which, according to the argument of counsel for the third defendant, convert what looks like an annuity into a settled legacy. The provisions are contained in cl. 7 of the testator's will, which provides as follows :

- D (a) I bequeath (free of all duties payable on my death whether by instalment or in one sum but not on the death of the annuitant) to the above-mentioned Hilda Alice Palethorpe an annuity of £200 for her life without power of anticipation during any coverture to commence from my death and to be considered as accruing from day to day but to be paid by equal half-yearly payments the first payment to be made at the end of 6 months after my death. (b) I direct my trustees to set apart as soon as conveniently may be and invest in their names in any of the
- E investments authorised by law with power to vary investments a sum the income whereof when invested shall be sufficient at the time of investment to pay the said annuity and to pay the same accordingly with power to resort to the capital of the appropriated fund whenever the income shall be insufficient and until such sum shall be so appropriated I charge my residuary personal estate with the said annuity but after appropriation my residuary estate shall thereby be discharged from the said annuity. (c) During the lifetime of the said Hilda Alice Palethorpe
- F any surplus income of the appropriated fund shall be applied in the same manner as income of my residuary estate. (d) On the death of the said Hilda Alice Palethorpe my trustees shall divide the appropriated fund or so much thereof as shall not have been resorted to to make up deficiency of income equally between (i) the General Infirmary at Leeds (ii) the Women and Children's Hospital at Leeds (iii) Doctor Barnardo's Homes and (iv) the Salvation Army.

- These are the provisions of the will which have to be considered in the
- G present case. On the one hand, on behalf of Hilda Alice Palethorpe, the argument is that she is an annuitant for the sum of £200, and, as there is an insufficient estate to provide for her annuity and the other pecuniary legacies, accordingly the general rule I have stated must be applied. That is in accordance with the rule in administration as
- H it was decided to be by FARWELL, J., in *Re Farmer, Nightingale v. Whybrow* (1) upon the provisions of a will which in substance are indistinguishable, in my judgment, from those in the will which I have to consider in the present case. The other contention, advanced on behalf of the four named charities, is this. Ascertain the sum required to buy investments to produce by their income the annual sum of £200,

and regard that sum as a settled legacy, and abate it proportionately with the other pecuniary legacies. Invest the abated sum in the purchase of $2\frac{1}{2}$ per cent. consols, and out of the income thereof and of so much of the capital as is necessary, pay to the annuitant during her life, or until the invested sum is exhausted, the yearly sum of £200. That is in accordance with the decision of CROSSMAN, J., in *Re Nicholson, Chadwyck-Healey v. Crawford* (2). The provisions in the will in *Nicholson's* case (2) are substantially indistinguishable from those in *Farmer's* case (1) and in the present case. It is said that there is other authority which has a bearing upon the question, and two other decisions were referred to, both of them in 1939. The first is a decision of SIMONDS, J., in *Re Carew, Channer v. Francklyn* (3), in which a testatrix directed that, after the death of her sister, to whom she gave a life interest in her residuary fund [p. 795 ; [1939] 3 All E.R. at p. 202] :

... her residuary trust fund should be held on certain trusts—namely, to pay to each of the children of one John Warrington Carew (other than Gerald Carew) who should be living at the death of the survivor of herself and her sister, the sum of £250 free of duty, then to pay to her cousin Mary Brenda Francklyn during her life, the yearly sum of £500 free of duty, and after her death to hold the capital representing such yearly sum of £500 on such trusts as the said Mary Brenda Francklyn should by will appoint, and if she should die intestate to hold such capital and the income thereof on the trusts thereafter declared in favour of the children of the said John Warrington Carew. There was a similar direction with regard to the payment of an equal yearly sum to her cousin Leila Caroline Francklyn, and a similar disposition of the capital representing such yearly sum. There was then a direction to pay a number of other pecuniary legacies of substantial amounts. Finally there was a direction to hold the residue of the residuary trust fund [for certain purposes].

The estate was deficient, and the question was how to deal with the two annuities to the testatrix's cousins, Mary Brenda Francklyn and Leila Caroline Francklyn. Upon the construction of that will, SIMONDS, J., came to the conclusion that there was a settled legacy of such sum as, when invested, would produce the yearly sum of £500, and abatement was to take place upon the footing of that construction. It seems to me that that case has nothing whatever to do with the case which I have to decide here. It is not possible, in my judgment, as a matter of construction, to hold that by cl. 7 of this will the testator has settled a legacy upon anybody. He has done no such thing. All he has done is to give an annuity of £200. The other case relied upon is *Re De Chassiron, Lloyds Bank, Ltd. v. Sharpe* (4), a decision of MORTON, J. That is also a case in which the decision rests, as it seems to me, upon the particular wording of the will which MORTON, J., there had to consider. It has no possible bearing, in my judgment, upon the question raised by this summons, and, therefore, it falls to me to decide whether the rule laid down by FARWELL, J., in *Re Farmer, Nightingale v. Whybrow* (1) or the rule laid down by CROSSMAN, J., in *Re Nicholson, Chadwyck-Healey v. Crawford* (2) is the right one. For myself, I feel no doubt about it. Clause 7 of this will gives Hilda Alice Palethorpe an annuity of £200 during her life. All the other provisions contained in cl. 7 are, in my judgment, merely administrative provisions subsidiary

to that bequest, put into the will for the purpose, first, of securing the annuity, and, secondly, of freeing the testator's estate from the charge imposed upon it to pay the annuity of £200. The interests of the four charities are subject and subsidiary to the interest of the annuitant. In my judgment, there is not any sum settled upon trusts for the benefit of the four charities. It is not possible, having regard to the insufficiency of the testator's estate, to do what the testator directed his trustees to do for the purpose of securing the annuity—namely, to set aside securities producing an income sufficient to satisfy the annuity. It seems to me that there is nothing to touch or affect the general rules of administration established for many years in regard to an annuitant where the estate of the testator is insufficient to pay in full both an annuity and pecuniary legacies. The general rule, in my judgment, must be applied. The annuity must be valued, and the value must be abated proportionately with all the other pecuniary legacies. The annuitant, not being, as I understand it, a married woman, is entitled to have paid to her the abated value of her annuity. The annuity will be valued as at the death of the testator.

Solicitors: *Haslewood, Hare & Co.*, agents for *C. V. Walker*, Leeds (for the plaintiffs and the fourth defendant); *Bolton, Jobson & Yates Lee* (for the first defendant); *Arthur Pyke & Co.* (for the second defendant); *Frank Taylor & Nightingale*, agents for *Dibb, Lupton & Co.*, Leeds (for the third defendants); *Treasury Solicitor* (for the Attorney-General).

[Reported by **IRENE G. R. MOSES**, *Barrister-at-Law*.]

WILLIAMSON v. JOHN I. THORNYCROFT & CO., LTD., AND OTHERS.

GOULDING AND ANOTHER v. JOHN I. THORNYCROFT & CO., LTD., AND OTHERS.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), **August 13, 14, 1940.**]

Negligence—Negligence causing death—Damages—Death of widow before trial of action.

In an action under Lord Campbell's Act in respect of the death of a man who left a widow and one son, it was proved that before the trial of the action the widow had died. It was contended that, in assessing the damages, the judge ought not to take into account the fact that the widow subsequently died:—

HELD: in assessing damages in such a case, the court should take into account every material event which had happened up to the date of the trial, and in this case the death of the widow was a matter to be taken into account.

[EDITORIAL NOTE.] The general date for the assessment of damages is the date of the accrual of the cause of action. Where such matters as the expectation of life or the probable earnings of the widow have to be assessed, the court, if the parties have acted expeditiously, is usually left to mere conjecture. If the parties

allow some time to elapse before the action is brought to trial, there may be events subsequent to the accident which will throw considerable light upon the difficult problem of the assessment of such damages. The Court of Appeal have held that evidence of such happenings may be given, and that the assessment should be based upon the knowledge gained from such evidence.

AS TO ASSESSMENT OF DAMAGES UNDER LORD CAMPBELL'S ACT, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 694-699, paras. 981-986; and FOR CASES, see DIGEST, Vol. 36, pp. 132-134, Nos. 872-893.] A

APPEAL by the defendants from a judgment of SINGLETON, J., dated June 7, 1940, by which he awarded the plaintiffs £3,400 damages in an action brought under Lord Campbell's Act and the Law Reform (Miscellaneous Provisions) Act, 1934. The appeal was only upon the question of damages, and the main contention concerned the total amount of damages to be awarded. The second point of the appeal, and the only one with which this report is concerned, was with regard to the date at which the judge ought to assess the damages under Lord Campbell's Act in respect of the widow's loss by reason of her husband's death. On this point, the facts were unusual. The husband was killed in an accident on a trial trip of a naval vessel built by the appellants. He left a widow and one son. The widow died about 14 months after the husband's death, and before the trial of the action. In these circumstances, SINGLETON, J., held that, in assessing the damages, he ought to take no account of the happenings subsequent to the date of the accrual of the cause of action. He therefore ignored the evidence that the widow had in fact died, and assessed the damages upon the basis of her expectation of life at the time of the accident. The defendants appealed. B C D E

W. Blake Odgers, K.C., and Felix Denny for the appellants.

H. D. Samuels, K.C., and A. Aiken Watson (for *A. H. Armstrong* on war service) for the respondents. F

SCOTT, L.J.: The judge, in my view, took an erroneous view of the date at which he ought to assess the damages or compensation in such a case. He looked back to the date of the death, and gave the widow a proportion of the damages under Lord Campbell's Act which represented, not the actual amount she had lost during the 14 months which she lived after her husband's death, but a sum based upon her whole prospect of life at the date of her husband's death. It is quite true that the measure of damages has to be assessed as at that date, but the courts, in doing justice on questions of damages, are entitled to inform their minds by the events which have happened subsequent to the date at which the cause of action accrued as throwing light upon the reality of the case. In my view, it would be wholly wrong to say that, where a death has occurred, as in this case, in circumstances involving the liability of a third party some years before the assessment of damages by the court, the court ought to shut its eyes to the fact G H

that one dependant only had a short tenure of life before her dependence was brought to an end. In my view, in the circumstances of the case, only a comparatively small figure ought to have been allowed for the wife under Lord Campbell's Act.

A CLAUSON, L.J. : agreed, but did not deal specifically with the point here reported.

DU PARCQ, L.J. : We have not heard counsel for the respondents on the point which was argued by counsel for the appellants, about the

B date at which the assessment of damages should be made, or with regard to which the assessment of damages should be made. Subject to that; however, I am bound to say that I think that it is important that judges should not follow the course adopted by SINGLETON, J., here. I cannot help thinking that there has been some confusion of thought about that.

C In one sense, it may be true to say that the moment at which one fixes the damages, whether in an ordinary case of tort or in a case under Lord Campbell's Act, is the moment of the death. However, that does not mean that one should shut one's eyes to everything which has happened subsequently. When a man is killed, as in this case, it is

D necessary to look and see what the result of his death is going to be in the way of pecuniary loss under the Act. It may be, if the parties are very expeditious, and if the courts are able to deal with the matter early, that the case will come before the courts when many matters are left in doubt. However, the question which the judge and jury have to

E decide is what was the resulting damage when that man was killed. The court always has to do its best to discover that on the available materials. One of the elements which has to be taken into account under Lord Campbell's Act is the dependants' prospects of life. In

F most cases which I have tried, nobody has suggested that the widow was in anything but good health. Sometimes it was said that the widow was an elderly lady, and could not be expected to live very much longer, but one seldom heard it said that the widow was suffering from some illness, and, therefore, could not live much longer. However, I have

G known it argued, and nobody has ever doubted that the evidence is admissible to prove, that the widow or any other dependant could not be expected to live long. That does not mean that one is to assess the damages as at some later date. It means that, in assessing the damages, if one can find that certain events have happened, one is in a happier

H position than if one has to speculate as to what events are likely to happen. In this case, if the widow had still been living when the matter had come before the judge, nobody would doubt—certainly it would be contrary to well-established practice if anyone were to suggest any doubt—that evidence could have been called to show that unhappily she was suffering from a grievous disease, and that it was unlikely that she would live more than a few months. If that is so (and I conceive that there

is no question about it), it seems incomprehensible that it should be suggested that the court—because that is what it practically comes to—must say, “I cannot hear evidence to show that the woman is dead,” or, rather, “Although she is dead I must shut my eyes to that fact. I must assume that she is alive and must speculate in that region of phantasy as to her prospects of continuing to live.” With the greatest A
 respect to the judge I think that the observations of counsel for the appellants are very well-founded so far as that is concerned. It is difficult enough very often to assess damages on the evidence which is available. There are many chances to be taken into account in cases under Lord Campbell’s Act, and it would introduce quite unnecessary B
 difficulties if juries were to be told that they had to shut their eyes to what they knew had happened. I have made these remarks because I think it is important that one should make sure, if possible, that these unnecessary difficulties will not be introduced into cases of this kind. I have only to add that I agree entirely with what has been said by C
 SCOTT and CLAUSON, L.JJ.

Solicitors : *Rashleigh, Turner, Mann & Rosher* (for the appellants) ;
Amphlett & Co., agents for *R. V. Stokes & Metcalfe*, Portsmouth (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re PARSONS' SETTLEMENT, BARNSDALE AND ANOTHER
v. PARSONS AND OTHERS.

[CHANCERY DIVISION (Bennett, J.), July 24, 25, August 28, 1940.]

Trustees—Appointment of new trustee—Who may appoint—Infant—Appointment of mother of infant as sole trustee—Mother also interested in fund—Validity of appointment.

By a settlement, dated Nov. 9, 1920, the power of appointing new trustees was given to N. J. B. P., who was then aged 9 months, and who was absolutely entitled under the settlement on attaining the age of 25 years. Until that time, the income of the trust fund was to be applied to his maintenance and education and for his benefit, and the trustee was authorised to pay any surplus income to the infant's mother. On the death of the sole trustee on Feb. 2, 1940, N. J. B. P., while still an infant, purported to appoint his mother as sole trustee. It was claimed that the appointment was an invalid exercise of the power, owing to the appointor's infancy. In favour of the appointment, it was contended that the power was a power in gross, and, as such, exercisable over personality by an infant :—

HELD : the appointment of the mother as sole trustee placed her in a position in which there would be a conflict between her duty and her interest, and was, therefore, prejudicial to the benefit of the infant, and was an appointment which the court would not make. The appointment was, therefore, invalid.

[EDITORIAL NOTE.] The general principle is that an infant is not bound by an act which is prejudicial to him or his property. In the present case, this principle is considered in relation to the exercise of a power of appointment of a new trustee. Where an infant has been given such a power, and exercises it, and has a beneficial interest in the trust property, it must be shown that his exercise of the power is for his benefit. It would seem that, in the case of the appointment of a new trustee, the appointment must be one such as the court itself would make.

AS TO APPOINTMENT OF NEW TRUSTEES BY INFANT, see HALSBURY, Hailsham Edn., Vol. 33, pp. 168-170, paras. 285-290; and FOR CASES, see DIGEST, Vol. 43, pp. 674-677, Nos. 1046-1077.]

Cases referred to :

- (1) *Re D'Angibau, Andrews v. Andrews* (1879), 15 Ch.D. 228; 28 Digest 149, 101; 49 L.J.Ch. 182; 41 L.T. 645; *affd.* (1880), 15 Ch.D. 236.
- (2) *Re Cardross's Settlement* (1878), 7 Ch.D. 728; 28 Digest 150, 109; 47 L.J.Ch. 327; 38 L.T. 778.
- (3) *Zouch d. Abbot & Hallet v. Parsons* (1765), 3 Burr. 1794; 28 Digest 142, 28.
- (4) *Hearle v. Greenbank* (1749), 1 Ves. Sen. 298; 28 Digest 149, 100.
- (5) *Re Sutton, Boscarven v. Wyndham*, [1921] 1 Ch. 257; 28 Digest 150, 110; 90 L.J.Ch. 71; 124 L.T. 526.
- (6) *King v. Bellord* (1863), 1 Hem. & M. 343; 28 Digest 150, 105; 32 L.J.Ch. 646; 8 L.T. 633.

ADJOURNED SUMMONS to determine whether or not a power of appointment of new trustees given in a settlement dated Nov. 9, 1920, was validly exercised by a purported appointment made on Apr. 21, 1940, by Norman John Bridges Parsons, who was then still an infant. The facts are fully set out in the judgment.

P. L. Bushe-Fox for the plaintiffs.

M. Gravenor Hewins for the first and second defendants.

B. F. Mendel for the third defendant.

Hewins : There is no reported case which determines whether or not the power of appointing new trustees given in a settlement can be exercised by an infant. An infant can exercise a power collateral as to both real and personal estate, and, with regard to a power in gross, it was held in *Re D'Angibau, Andrews v. Andrews* (1) that an infant can exercise a power in gross over personalty. *Hearle v. Greenbank* (4) is merely authority for saying that an infant cannot exercise a power in gross over realty, and is expressly confined to realty. This power of appointing new trustees is a power in gross, and is within *Re D'Angibau, Andrews v. Andrews* (1). In *Re Cardross's Settlement* (2), it was held that, if an infant has a power over property in which he has an interest, an exercise of it during infancy is good if it can be inferred from the power that it should be so used. In *Re Sutton, Boscawen v. Wyndham* (5), it was held that a power appendant over property cannot be exercised by an infant unless a clear intention that he should do so is expressed. The main submission is that this is a power in gross, and, therefore, exercisable during infancy. If it is not such a power, and it is necessary to show a clear intention that the appointor should exercise the power during infancy, the intention can be gathered from the settlement. The son is absolutely entitled on attaining the age of 25 years, and, if this power is not to be exercised during infancy, its duration will be very short. [Counsel referred to *King v. Bellord* (6).]

Mendel : This is not a power in gross as defined in *Re D'Angibau, Andrews v. Andrews* (1), at p. 232—that is, a power given to a person who has an interest in the property over which the power extends—but is such an interest as cannot be affected by the use of the power. In *Re Cardross's Settlement* (2), a power to consent to a change of investments was held to be a power appendant, and the power given in this settlement, which gives the appointee an even greater discretion, could not be a power in gross. If it is not a power appendant, then it is a power *sui generis*: FARWELL ON POWERS, 3rd Edn., p. 11. There is a great distinction between powers over property and the power of appointing a trustee. If it is a power appendant, *Re Sutton, Boscawen v. Wyndham* (5) is clear authority for saying that it is necessary to show an intention that the power should be exercised during infancy, which cannot be gathered from the settlement. *Hearle v. Greenbank* (4) is authority for holding that the court will not decide when an infant is discreet. The fact that the trustee could be removed if unsuitable is not a sufficient justification.

BENNETT, J. : This summons raises an interesting question of law upon which there is no direct authority. The question is whether an infant can exercise a power of appointing a new trustee of a settlement.

By an indenture of settlement, dated Nov. 9, 1920, and made between Norman Ernest Parsons (thereinafter called the settlor) of the one part and Sir Herbert J. F. Parsons (thereinafter called the trustee) of the

other part, after reciting that the settlor was possessed of ordinary shares of and in a named limited company, and had transferred 250 of such shares into the name of the trustee, to the intent that the same should be held upon the trusts, and with and subject to the powers and provisions thereafter declared and expressed, it was witnessed by cl. 1
A that the trustee should stand possessed of those shares upon trust to apply the income arising therefrom, or so much of it as he should think fit, for the maintenance, education and benefit of the infant defendant, Norman John Bridges Parsons, until he should attain the age of 25 years. By cl. 2, the trustee was given a discretion as to the manner in which
B that income should be applied for the benefit of the infant defendant, and it was provided that he should be at liberty, if he should think fit, to pay the same to his father and mother, whose receipt should be a full and sufficient discharge. In cl. 3 and 4, there were provisions regarding the sale of the shares and the investment of the proceeds of sale. By
C cl. 5, it was provided that, when and so soon as the infant defendant should have attained the age of 25 years, the trustee should stand possessed of the shares, or of the securities for the time being representing the same, upon trust for the infant defendant absolutely. Clause 6 provided that the power of appointing new trustees should be vested
D in the settlor during his life, and after his death in the infant defendant, and after the death of the survivor of them in the trustee for the time being of the indenture.

The settlor died on Nov. 18, 1926. The trustee, Sir Herbert Parsons, died on Feb. 2, 1940. The plaintiffs are the executors of his will, which
E was proved on Apr. 18, 1940. The infant defendant was born on Feb. 10, 1920, and on Apr. 21, 1940, being then an infant, he executed a deed whereby he purported to appoint his mother, the defendant Marion Frances Jessie Parsons, sole trustee of the indenture of settlement. The shares originally settled have been sold, and are now represented by investments of a value of about £20,000. Not unnaturally,
F the plaintiffs, before transferring the trust fund to a sole trustee appointed by an infant, wish to know whether or not, having regard to the fact that the appointor is an infant, the deed of appointment is a valid and effectual instrument. The infant defendant was 9 months old when
G the settlement was made, and is now an officer in the Royal Navy. Both the infant defendant and his mother supported the appointment. Its validity was questioned by the defendant Harold Edward Stuart Parsons, one of the personal representatives of the settlor, whose estate, of course, would be entitled to the settled fund if, by some misfortune,
H the infant defendant should die under the age of 25 years.

As I stated at the beginning of my judgment, there is no direct authority upon the question raised. Those who supported it argued, first, that the power was either a power in gross or a collateral power over personal estate, and, being such, might be executed by an infant, relying upon the authority of *Re D'Angibau, Andrews v. Andrews* (1)

to support the argument. That was a case in which a question arose as to the validity of an appointment made by a married woman who was an infant disposing of personal property comprised in a marriage settlement. By the settlement, which was made in 1874, it was agreed that after the marriage, as soon as the case would admit, certain personal estate standing in the names of the trustees of the will of the lady's father in which the lady would take a vested interest at the age of 21 years, or earlier on her marriage, subject to an annuity for her mother's life, should be assigned to trustees in trust to pay the income to the lady for life and after her death to her husband until bankruptcy or alienation, and then, in the event which happened, to hold the capital on trust for such person or persons as the lady should by deed or will appoint. The lady appointed the fund to her husband by deed, and died when she was still an infant. The appointment by her was held valid by a majority of the Court of Appeal, affirming the decision of SIR GEORGE JESSEL, M.R. It was not disputed that the exercise by an infant of a collateral power was valid as regards both real and personal estate. What was in question was the validity of the exercise by an infant of a power in gross over personal estate. For the purposes of his judgment, SIR GEORGE JESSEL, M.R., stated what he meant by the phrases power collateral, power in gross and power appendant, respectively. He said, at p. 232 :

The first power, a power simply collateral, I understand to be a power given to a person who has no interest whatever in the property over which the power is given. The second power, a power in gross, is a power given to a person who has an interest in the property over which the power extends, but such an interest as cannot be affected by the exercise of the power. The most familiar instance is that of a tenant for life with a power of appointment after his death. Then the third kind of power is a power exercisable by a person who has an interest in the property, which interest is capable of being affected, diminished or disposed of to some extent by the exercise of the power. That power is commonly called a power appendant or appurtenant.

Having so defined the phrases, SIR GEORGE JESSEL, M.R., came to the conclusion that the power in question, being a power in gross over personal estate, was exercisable by an infant. His decision was affirmed by a majority of the Court of Appeal. I do not think that *Re D'Angibau, Andrews v. Andrews* (1) is an authority upon the point in issue, having regard to the definitions of SIR GEORGE JESSEL, M.R. A power to appoint a new trustee differs technically from a power to dispose of property in which an infant has no interest and from a power to dispose of property in which the infant has an interest but an interest which cannot be touched by the execution of the power, for the exercise of such power cannot prejudice an infant, and does not touch or concern the infant's interest in property. A power to appoint to an office, such as the office of a trustee, may vitally affect the infant's interests if he has a beneficial interest in the property the subject of the trust, and may also prejudice him and his pecuniary interest.

It was also argued on behalf of the infant defendant and his mother

that the settlement in question showed an intention on the part of the settlor that the infant defendant should execute the power notwithstanding his infancy. In support of this argument, the fact that the power was expressly given to the infant defendant after the settlor's death was relied on. It was argued that the settlement showed a manifest intention that the infant should execute the power. This argument was advanced on the authority of *Re Cardross's Settlement* (2). In that case, a settlement had been made on the occasion of the marriage of Lady Cardross, an infant ward of court, she being described in the settlement as "an infant of 17 years and upwards." Certain investments the property of Lady Cardross were vested in trustees upon trust after the solemnisation of the marriage to retain the existing investments or to re-invest as therein mentioned with the consent of Lady Cardross and her husband during their joint lives, and after the decease of either of them with the consent of the survivor of them, and after the death of such survivor at the discretion of the trustees. While Lady Cardross was still a minor, a reinvestment of part of the trust fund arose, and the question was whether or not, as she was a minor, she was able to give her consent. The matter came before SIR GEORGE JESSEL, M.R., and, in the course of his judgment, he said, at p. 729 :

Now when you look at the settlement itself it is manifest that in giving this power, exerciseable during the joint lives of Lord and Lady Cardross, it was contemplated that it might have to be exercised during their joint lives, and possibly during the minority of Lady Cardross. Indeed, it would be most improbable that some change of investment would not be required or be found desirable before Lady Cardross attained 21. Therefore, on the face of this settlement, there is evidence of contemplation on the part of the author of this power that the power might be exercised during minority.

He then considered whether or not, on that intention being manifest, it was sufficient to remove the disability of infancy, and, having considered the authorities, he decided that it was. In my judgment, it is not manifest upon the face of this settlement that the author of it contemplated that it might be exercised during the minority of the infant defendant. Supposing the settlor and the original trustee had died a few weeks after the date of the settlement, it is inconceivable that the settlor could have contemplated the exercise of the power by an infant unable to speak, to read or to write. When the relevant and admissible facts are proved, there is no foundation, in my judgment, for the argument that there appears on the face of this settlement an intention that the donee of the power of appointing new trustees should execute it during infancy.

The question then seems to be one which must be answered by reference to first principles. Infancy does not produce in a person a total incapacity to act. There are many acts which an infant may do and by which he is bound. There are others which are absolutely void and of no effect, and others again which are voidable only. There are numerous authorities, through all of which it is unnecessary to travel

if the principles can be extracted. Upon the question of principle, I will refer first to COKE UPON LITTLETON, sect. 259 :

And it is to be understood, that when it is said, that males or females be of full age, this shall be intended of the age of 21 yeares ; for if before such age any deed or feoffement, grant, release, confirmation, obligation, or other writing, be made by any of them, &c. or if any within such age be baylife or receiver to any man, &c. all serve for nothing, and may be avoided.

The first commentary of Sir Edward Coke in this section is as follows, at p. 171 (b) :

The law hath provided for the safety of a man's or woman's estate, that before their age of twentie-one yeares they cannot binde themselves by any deed, or alien any land, goods or chattels.

Later on, at p. 172 (a), he has some comments upon the words of Littleton :

"Or other writing, be made by any of them, &c." Here by this &c. is implied some exceptions out of this generality, as an infant may bind himself to pay for his necessary meat, drinke, apparell, necessary physicke, and such other necessaries, and likewise for his good teaching or instruction, whereby he may profit himself afterwards : but if he bind himself in an obligation or other writing with a penalty for the payment of any of these, that obligation shall not bind him. Also other things of necessity shall bind him, as a presentation to a benefice, for otherwise the laps shall incur against [him]. . . . Also if an infant be an executor upon payment of any debt due to the testator, he may make an acquittance ; but in that case a release without payment is voyd : and generally whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law. But of this common learning this little tast shall suffice.

Next I will refer to a case which has the high authority of LORD MANSFIELD—namely, *Zouch d. Abbot & Hallet v. Parsons* (3). In that case, one John Bicknell conveyed a messuage in lands to one William Cook by way of mortgage to secure a sum of £280. William Cook died, leaving John Lamb Cook, an infant, his eldest son and heir, and also leaving his widow Elizabeth Cook and John Lamb Cook his joint executors and residuary legatees. When John Lamb Cook was between 16 and 17 years of age, by indenture of lease and release made between John Lamb Cook and his mother of the first part, John Bicknell, the mortgagor, of the second part, and Abbot and Hallet, the lessors of the plaintiff, of the third part, John Lamb Cook and his mother in consideration of £280 conveyed the premises to Abbot and Hallet in fee. The question was whether or not that conveyance bound the infant. The Court of King's Bench held that it did. LORD MANSFIELD begins the reasoning of his judgment in this way, at p. 1801 :

The merits of this cause turn upon two general questions : first, Whether this conveyance is good, and binds the infant ; secondly, If it does not bind the infant, whether the defendant can take advantage of the infancy, and on that account object to it. As to the first—miserable must the condition of minors be ; excluded from the society and commerce of the world ; deprived of necessities, education, employment, and many advantages if they could do no binding acts. Great inconvenience must arise to others, if they were bound by no act. The law, therefore, at the same time that it protects their imbecility and indiscretion from injury through their own imprudence, enables them to do binding acts, for their own benefit ; and, without prejudice to themselves, for the benefit of others.

The last sentence is a pregnant one, and really holds in it all the law

regarding the disabilities caused by infancy. Infants will be protected from injury through their own imprudence. The law permits them to do binding acts (a) if they are for their own benefit, or (b) if they are for the benefit of others and do not prejudice themselves. It necessarily follows that the law will avoid imprudent acts done by infants and acts done by infants for the benefit of others but prejudicial to their own interests. LORD MANSFIELD then proceeds to mention a rule or two as follows, at p. 1801 :

If an infant does a right act which he ought to do, which he was compellable to do, it shall bind him : as if he makes equal partition ; if he pays rent ; if he admits a copyholder, upon a surrender. But there is no occasion to enumerate instances ; the authorities are express ; and the reason decisive—"generally, whatsoever an infant is bound to do by law, the same shall bind him, albeit he doth it without suit of law."

Then he says, at p. 1802 :

Another rule, which may be collected from the books, is "that the acts of an infant, which do not touch his interest, but take effect from an authority which he is trusted to exercise, are binding" : as, where an infant-patron presents ; an infant-executor duly receives and acquits, pays and administers the assets ; an infant-head of a corporation joins in corporate-acts ; an infant-officer does the duty of an office which he may hold. A third rule deducible from the nature of the privilege, which is given as a shield, and not as a sword, is "that it never shall be turned into an offensive weapon of fraud or injustice." As where tenant for life and infant in remainder levied a fine, the infant reversed the fine, as to himself, for the inheritance, for nonage ; yet he shall be bound by his assent to the fine and joining in it, not to enter for the forfeiture. And the fine was held good, as to the estate of tenant for life ; and reversed *quoad* the infant only.

I will now consider whether the reasons of these rules are applicable to the present case, premising that I deduce from what LORD MANSFIELD said that an infant will not be bound by any act which is either imprudent or prejudicial to his interests, or which, where he is executing an authority with which he is entrusted, touches his interest. Whether the act is void or voidable does not seem to me to matter in the present case. The trust fund here is of a value of about £20,000. The income of it is applicable for the maintenance, education and benefit of the infant until he attains the age of 25 years. A trustee is authorised to pay the income to the infant's mother until he attains the age of 25 years. On attaining the age of 25 years, the infant becomes absolutely entitled to the capital.

In my judgment, it is an imprudent act to appoint a single trustee of such a fund, whoever he or she may be. The court would never make such an appointment. In my judgment, it is an imprudent act to appoint the particular person selected by the infant to be sole trustee, for she need account to nobody, and must often find herself in a position in which there must be a conflict between her duty and her interest. In my judgment, in executing the authority entrusted to him by the settlement, the infant is touching his interest. He is touching his interest in the trust fund. For these reasons, the infant is not bound by the appointment he purports to have made, and I answer the question asked by the summons by saying that the defendant Marion Frances

Jessie Parsons has not been validly appointed to be a trustee of the settlement in question.

Declaration that appointment invalid. Costs taxed as between solicitor and client to be paid out of the estate.

Solicitors: *Smallman & Son* (for the plaintiffs and for the third defendant); *Woolfe & Woolfe* (for the first and second defendants).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

FRIIS v. PARAMOUNT BAGWASH CO., LTD. (No. 2).

[COURT OF APPEAL (Scott, Luxmoore and du Parcq, L.JJ.), August 21, 1940.]

County Courts—Costs—Costs of taking evidence before examiner—No direction as to costs in order—High Court practice applicable—County Courts Act, 1934 (c. 53), s. 100—C.C.R., Ord. 47, r. 1.

In an action in the county court, an order was made that the evidence of a witness should be taken before an examiner. No order as to costs was made. The action was eventually dismissed with costs:—

HELD: the costs of taking the evidence before the examiner were rightly included in the costs of the action, since, under the practice prevailing in the High Court, they would be costs in the cause.

[EDITORIAL NOTE.] The general rules followed for ascertaining in what cases the costs of an interlocutory application when the court gave no direction as to costs become costs in the cause were laid down by SIR JOHN LEACH, V.-C., in 1832 as follows: (i) a party making a successful application is entitled to his costs as costs in the cause, but the party opposing it is not entitled to his costs as costs in the cause; (ii) the party making an application which fails is not entitled to his costs as costs in the cause, but the party opposing it is entitled to his costs as costs in the cause; (iii) where an application is made by one party and not opposed by the other the costs of both parties are costs in the cause. These rules are stated in a memorandum reported in 1 Sim. & St. 357.

AS TO COSTS OF INTERLOCUTORY APPLICATIONS IN COUNTY COURT, see HALSBURY, Hailsham Edn., Vol. 8, p. 365, para. 777; and FOR CASES, see DIGEST, Practice, pp. 887, 888, Nos. 4284-4292; SEE ALSO YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 1482, 1483.]

APPEAL by the plaintiff from an order of His Honour JUDGE BENSLEY WELLS at Greenwich County Court, dated July 1, 1940. The matter arose out of an appeal on the question of costs, which is reported [1940] 1 All E.R. 595. The appellant, the plaintiff in an action which was commenced in the High Court, claimed about £45 alleged to be due to him for services as secretary and accountant to the defendant company. Unconditional leave to defend was given, and the matter was remitted to the Greenwich County Court. The plaint was issued in the county court on Dec. 9, 1938. On Jan. 13, 1939, the respondents entered a defence, counterclaimed for £28 18s. 3d., and further asked for the return of certain books of the respondents alleged to have been detained by the plaintiff. On May 1, 1939, before the action came on for trial, application was made for the evidence of a witness to be taken before

an examiner, and the judge made an order for the examination. The action came on for trial on July 5, 1939, and was adjourned until Oct. 11, 1939. At the adjourned hearing, the plaintiff was represented by another counsel, who informed the court that he was not ready to proceed. The judge made an order that the action should be dismissed with costs unless the plaintiff paid into court, on account of costs, the sum of £10 in 14 days. The plaintiff did not pay those costs. After the decision of the Court of Appeal on Feb. 12, 1940, the amended bill of costs came before the registrar for taxation, and a dispute arose as to whether or not the registrar had jurisdiction to tax the costs of the application to take evidence before the examiner, no order as to the costs having been made at the time when the application was granted. The registrar held that he had no jurisdiction. The judge reversed the order of the registrar and held that the costs were properly included in the bill, and this appeal was from that decision.

- A
- B
- C *Cecil R. Havers, K.C., and E. M. Hoy* for the appellant.
H. J. Astell Burt for the respondents.

LUXMOORE, L.J. : This is an appeal from an order of His Honour JUDGE WELLS, sitting in the Greenwich County Court, in regard to a review of taxation. The judge reversed the order made by the registrar. The subject-matter of the question which we have to decide is as to the costs which were incurred in making an interlocutory application to the county court in respect of the examination before an examiner of a witness for the defence, the judge having made an order for such examination. The order having been made, the witness was examined, and items of costs were incurred as a result of that order. On Oct. 11, 1939, the judge made an order dismissing the plaintiff's action with costs. After that order had been made, an application was made to the judge with regard to special items of costs which the defendants were anxious should be included in the sum which they were entitled to be paid, so that there should be no question about them. The judge made an order on Oct. 14, 1939, and on Feb. 6, 1940, the matter came before this court, which decided that there was no jurisdiction to make any supplemental order and that the order of Oct. 14, 1939, was a final order. It decided the matter once and for all. The sole question for this court is whether or not the costs which have been incurred in making the application for the examination of a witness and in the subsequent examination are costs properly payable in the action. The registrar decided that he had no jurisdiction to allow any of the costs. The matter was referred to the judge, who reversed the order of the registrar and held that the costs were properly included in the bill. There is no doubt that the costs were interlocutory costs, and C.C.R., Ord. 47, r. 1, provides as follows :

Subject to the provisions of any Act or rule, the costs of proceedings in a county court shall be in the discretion of the court . . .

On behalf of the appellant, it is said that, as the order is silent as to these costs, the county court judge has not exercised his discretion, and, therefore, none of these costs is to be paid. It is a well-settled practice in the High Court that costs in an interlocutory matter are dealt with according to the practice which was laid down in 1832 and which has been followed ever since. That practice is : where an order is silent as to costs, the party who makes a successful application is entitled to his costs as costs in the cause. If the application made by one party is assented to by the other, the party who is successful gets the costs of that application as costs in the cause. That is the settled practice of the High Court. The County Courts Act, 1934, s. 100, provides as follows :

In any case not expressly provided by or in pursuance of this Act, the general principles of practice in the High Court may be adopted and applied to proceedings in a county court.

It is plain that there is no express provision with regard to the costs of interlocutory applications, which were dealt with at the hearing of that application. If the judge had said that he was not going to allow costs in respect of the application, or if he had decided to give costs to one party or to the other, the matter would have been one for the discretion of the judge. If, however, nothing is said, the matter clearly falls within sect. 100. That being so, although the judge did not exercise any discretion, the ordinary High Court rules apply, and the successful defendant, who has been given the costs of the action, gets the costs of all such interlocutory applications as he would get by the application of those rules. The costs of his application for the examination of the witness are costs to which he is entitled. He made a successful application. The judge was satisfied that it was a proper application, because he made the order. The costs which followed are necessary costs resulting from the order which was made. For these reasons, I think that the decision of the county court judge in overruling the decision of the registrar was right. This appeal must be dismissed with costs.

SCOTT, L.J. : I agree.

DU PARCQ, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Morris & Son* (for the appellant) ; *Wedlake, Letts & Birds* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

LYUS v. STEPNEY BOROUGH COUNCIL.

[KING'S BENCH DIVISION (Humphreys, J.), August 19, 1940.]

Emergency Legislation—Duty to light streets—Sand-bin on pavement—Lighting restrictions—How far affecting obligation to light obstructions in street—Metropolis Management Act, 1855 (c. 120), s. 130—London County Council (General Powers) Act, 1928 (c. lxxvii), s. 33—Lighting (Restrictions) Order, 1939 (S.R. & O., 1939, No. 1098), para. 1.

Highways—Obstructions—Sand-bin on pavement—Suspension of statutory duty to light streets—Common law duty to persons using highway.

The plaintiff, while walking home during the black-out on Sept. 15, 1939, collided with a sand-bin which had been lawfully placed on the pavement by the defendant council under the authority of the London County Council (General Powers) Act, 1928, s. 33. This section also provides that the council must do nothing to hinder the reasonable use of the street by the public. On account of the Lighting (Restrictions) Order, 1939, there were no lights in the street, and the sand-bin was invisible to the plaintiff proceeding without negligence. Obstructions in more important streets of the borough had either been lighted or painted white, but nothing had been done with regard to this particular street or sand-bin :—

HELD : although the statutory duty to light the street was temporarily suspended by the Lighting (Restrictions) Order, 1939, the council was still under a common law duty to take such steps as were reasonable in the circumstances to prevent danger to persons using the highway. This it had failed to do, and was, accordingly, liable to the plaintiff in damages.

[EDITORIAL NOTE. The Lighting (Restrictions) Order, 1939, has temporarily suspended the obligation of a local authority under the Metropolis Management Act, 1855, s. 130, to light the streets in its district, but it is here held that there still remains a common law duty to take reasonable precautions, not necessarily confined to the provision of lighting, to prevent danger to persons using the highway. So far as an obstruction such as the sand-bin in this case is concerned, the danger could be neutralised either by having street lighting of low candlepower, as is permitted, but not required, by para. 4 (d) of the order, or by taking the very usual course of painting the obstruction white.

AS TO INDICATING OBSTRUCTIONS IN HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436 ; and FOR CASES, see DIGEST, Vol. 26, pp. 392-395, Nos. 1187-1212.]

Cases referred to :

- (1) *Great Central Ry. Co. v. Hewlett*, [1916] 2 A.C. 511 ; 38 Digest 16, 88 ; 85 L.J.K.B. 1705 ; 115 L.T. 349 ; *revsg.*, 114 L.T. 713.
- (2) *Wodehouse v. Levy (St. Marylebone Borough Council, Third Party)*, [1940] 3 All E.R. 137 ; Digest Supp. ; *affd.*, [1940] 4 All E.R. 14.
- (3) *Morrison v. Sheffield Corpn.*, [1917] 2 K.B. 866 ; 38 Digest 16, 89 ; 86 L.J.K.B. 1456 ; 117 L.T. 520.

ACTION for damages for injuries sustained by the plaintiff through a collision with an unlighted sand-bin placed by the local authority in one of its streets. The facts are fully set out in the judgment.

Gilbert H. Beyfus, K.C., and *E. T. Rhymer* for the plaintiff.

Cecil R. Havers, K.C., and *Harry Samuels* for the defendants.

HUMPHREYS, J. : The facts of the case are that the plaintiff, who is a man of 46 years of age, having been kept late at his work, was leaving

his place of business to go home at 9 p.m. on Sept. 15, 1939, when the black-out was in force. It was a particularly dark night. The street which he was going down is not well-lighted even in daytime, because it is not very wide, and has very high houses. Therefore, it was the sort of place which would be very dark on a dark night. Walking along that street, as I find, without any sort of negligence on his own part, he ran into an obstruction, which consisted of a sand-bin, perfectly properly put there by the defendant local authority. It stands back just a little further from the edge of the pavement than a lamp-post would and the size of it is agreed between the parties. The only information which I was given about it is that it is 3 ft. 5 ins. in front and 3 ft. 10 ins. at the back, and that it is the type of sand-bin with which everybody is quite familiar. A B

It is of galvanised metal, and, left in that form, it was, when erected in 1936, probably quite bright, and could be seen even on a dark night. In the course of 3 years, being in London, it had got dirty. It was exposed to the weather, and I have no doubt that it was an object which was not in the least conspicuous. This plaintiff was walking home, with nothing to distract his attention, and he was sober. He walked straight into the obstruction, and he would not have done that if it had been visible to him. He sustained injuries. C D

Whether he is entitled to recover anything is a question of law. The matter is put in this way. This sand-bin is an obstruction on the highway, and *prima facie* is an object unlawfully there. The defendants have satisfied me, however, that it was lawfully put there by them under statutory authority, which is to be found in the London County Council (General Powers) Act, 1928, s. 33, which provides that a borough council may provide and maintain in a street what are called orderly bins, for sand amongst other things. As one would expect, the section provides as follows : E

(2) Nothing in this section shall empower a borough council to hinder the reasonable use of a street by the public . . . F

The result of that statutory power was that the sand-bin ceased to be a nuisance, but that does not excuse the council who put it there from the obligation to use reasonable care to see that that which is an obstruction, although a lawful obstruction, does not cause injury to the public, who have the primary right of using that thoroughfare for the purpose of passing along it without hindrance. I cannot hope to put the matter better or more clearly than it was put by LORD PARKER OF WADDINGTON in *Great Central Ry. Co. v. Hewlett* (1), at p. 519 : G

My Lords, it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered. H

I have no doubt myself that that was the state of the law on Sept. 15, 1939.

What reasonable precautions were there which the defendants could take? The defendants were in this position. At the time when they erected this sand-bin in 1936, it was unnecessary for them to take any new precaution of any sort, because there was already in existence a statutory requirement that they should adequately light the streets in their borough, and they were doing it. Therefore, the sand-bin, being within a very short distance of a street lamp, was properly lighted. Then war broke out, and on Sept. 1, 1939, two days before war was declared, but in contemplation of that event, the Lighting (Restrictions) Order, 1939, was made by the Secretary of State for the Home Department under the Defence Regulations, 1939. Para. 1 of that order provides as follows:

Subject as hereinafter provided, no person shall during the hours of darkness cause or permit any light . . .

It is not necessary to read the other words, because they are general. Unless the light is excused in some way or another by these regulations, it is an offence to exhibit it. That had the effect of abrogating—temporarily, at all events—the Metropolis Management Act, 1855, which required the defendant council to light the street. Therefore, they quite properly ceased to light the streets. They had some time previously begun to take precautions to prevent persons using their streets from being endangered by obstacles which had been lighted but which were in future not to be lighted, because street lighting was to cease. It may be a moot question whether or not they ought to have commenced taking these precautions before Aug. 18, but I have it on oath from one of their officials that on Aug. 18 they did start to take steps to see that those lighted obstructions which they had put in the streets should be dealt with in some way or another, either by lighting them or by painting them white, so as to prevent persons from being injured by their existence in the dark street. That means that they realised that in law there was still a duty upon them to take reasonable precautions to see that, in carrying out this statutory duty of providing sand-bins, they did not cause unnecessary danger to the public.

I am told that they started on the more important thoroughfares and dealt with the refuges. Nobody can complain of that, because a refuge in the middle of the road is something which affects the traffic in the road as well as the pedestrian. Apparently, although the defendants started on Aug. 18, by Sept. 15 they had not got as far as this particular street in their borough, in which this accident occurred. In the course of time, if the plaintiff had been lucky enough not to be detained at his work until some time towards the end of Oct., 1939, or the beginning of Nov., 1939, he would have found that the bin was quite visible on the darkest night, because it had then been painted white. Unfortunately for him, on Sept. 15 there was no indication to him that the bin was there at all, because the borough council had not reached that street. The proposition which is put to me on behalf of the defendants

is, first of all, a proposition which is said to be derived from *Wodehouse v. Levy* (*St. Marylebone Borough Council, Third Party*) (2). I entirely agree with counsel that it is extremely difficult to reconcile that case with *Morrison v. Sheffield Corpn.* (3), which, as far as I know, was not referred to in *Wodehouse's* case (2) at all, though I should have thought that it was most apposite. In *Wodehouse v. Levy* (*St. Marylebone Borough Council, Third Party*) (2), CASSELS, J., held that the borough council had been guilty of a breach of duty in not lighting a certain obstruction. I think that he held that there was a statutory duty by reason of the old Lighting Act, though that does not matter. It is not contended in this case that that was right. He also held, however, that there still is a common law duty upon the borough council, not necessarily to light their streets—indeed, they must not light their streets—but to do what may reasonably be done to prevent people from suffering an accident as a result of this carrying out of the council's duties, which include placing obstructions in the street. There are the judgments in *Wodehouse's* case (2) of the members of the Court of Appeal, for whom I have the most profound respect, and in particular, perhaps, the judgment of GODDARD, L.J., who said, at p. 19:

Parliament having authorised the local authority to put a refuge in the street, and not having imposed on the authority the duty of putting a light on the obstruction itself, it follows that the local authority are committing no breach of statutory duty if they put a refuge in the street and do not put a light on that refuge.

Everybody agrees with that, so long as the street itself is lighted. Then GODDARD, L.J., continued as follows, at p. 19:

That, of course, in no way lessens the obligation of the borough council or other local authority to provide an adequate system of street lighting, and the system would not be adequate if it did not cause a reflection or light to show to people where obstructions in the street were. Thus, in peace time, when these refuges are in the streets, while there is no obligation on the council to put a beacon or lamp actually on the refuge, they must arrange their street lighting so that there will be enough light for passengers in the road to see, and thus to avoid, the obstructions which the council put there. . . . Their obligation is only to provide an adequate system of street lighting, and, when there came into force the order which prevented their lighting the streets at all, it followed that their obligation to provide street lighting was not only gone, but was actually prohibited. I can find no duty on the council, after that regulation came into force under which they were bound to light the obstruction, because, as MACKINNON and LUXMOORE, L.J.J., have pointed out, the provision in the order that the order does not apply to a certain class of lights is only permissive.

With that judgment, so far as it goes, I entirely agree. It does not seem to have been suggested in that case that there was another way in which the local authority might have prevented the obstruction from being a danger to traffic—namely, by whitening it. I do not know whether or not that is a thing which can be done. I do not know much about the streets at night in these days, but I do not find in the case any such argument as: “It is quite true that we cannot blame you for not lighting it, but why should you not whiten it?” The whole question turned, I think, upon whether, as CASSELS, J., seems to have held, it was right to say that, although the council were prohibited from showing lights

in the streets, nevertheless their statutory duty to light the streets in some way remained. With respect to the judge, that was rather a difficult proposition to maintain.

I now turn to *Morrison v. Sheffield Corpn.* (3). That was a case where a corporation had put some trees along some path or avenue. Round those trees they had put guards. Those railings were dangerous to any person walking along at night, unless the place was lighted, and, ordinarily, it was lighted. Then came the difficulty that street lighting was restricted. This was in 1917, in the Great War. The question then arose whether or not that extinguished the duty, which certainly till then had been upon the Sheffield Corporation, to see that persons were not endangered by the trees with those guards, which in themselves constituted an obstruction to people walking about in this place and lawfully using the highway. Two questions were left to the jury. The first was as follows :

Was the guard dangerous in the circumstances of the darkness that existed ? To that the jury answered that it obviously was. I should say the same in regard to this sand-bin. It obviously was. Then the second question was as follows :

Ought the defendants, if they exercised reasonable foresight and took reasonable measures, to have neutralised the danger before the date of the accident ?

The jury in that case answered in the affirmative. The contention for the defendants in that case was that, since they had erected the guards round the trees at times and in circumstances when it could not be contended that the place was not reasonably safe because of the system of lighting, no further duty was imposed upon them by the order which plunged the city into darkness. The EARL OF READING said that he found it impossible to accept that view of the law, and PICKFORD and SCRUTTON, L.JJ., agreed.

So far as it is necessary for me to say anything about the law, I express my own view that that is the law, and that the mere fact that a corporation is absolved from its duty of lighting the streets does not absolve it from any other duty which the common law may impose upon it to see that persons who are walking about the street are not unduly inconvenienced, and that accidents are not caused to them by any carelessness on the corporation's behalf. No doubt there is no absolute undertaking by them, nor are they absolutely required to see that persons do not have accidents. All that they are required to do is to exercise reasonable care.

That brings me to the difficult question here, which is the second question which was put in that case to the jury :

Ought the defendants, if they exercised reasonable foresight and took reasonable measures, to have neutralised the danger before the date of the accident ?

That seems to me to put the question very well. I regret that in this particular case there is not a jury to answer that question. The view I take of the matter is—if I am wrong about this, then my judgment is

clearly wrong—that, if there were a duty upon the defendants, in spite of the absence of any lighting regulations, to take some steps, such as were reasonable in the circumstances, to prevent danger to persons passing along this highway, then between Aug. 18, when they began to take those steps, and Sept. 15, when this accident occurred, they had ample time to do something. I do not care what it was they did. If they had only put a great splash of paint or whitewash on the edge of the obstruction, which was a great thing taking up very nearly half the width of the pavement, that could have been done by a man covering miles of roadway every day, and would have taken no time at all, and thus they would have prevented this accident. I cannot say that, in those circumstances, they have taken reasonable care. I think that, not unnaturally, they were paying so much attention to the main roads that they took the chance of somebody running into an obstruction in one of these minor roads, which were not used by through traffic. For those reasons, I find that there was negligence on their part, and I think that the plaintiff is entitled to damages.

Judgment for the plaintiff for £190 and costs.

Solicitors: *J. Tickle & Co.* (for the plaintiff); *J. E. Arnold James* (for the defendants).

[Reported by D. K. BELCHER, *Barrister-at-Law.*]

Re STUART, JOHNSON *v.* WILLIAMS.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), **July 23, 1940.**]

Practice—Costs—Costs out of estate—Appeal—Appeal upon question of construction—Failure of appeal—Notice to parties not likely to be heard on appeal.

The court has a discretion to order costs out of the estate in the case of an unsuccessful appeal upon a construction point, but will only do so where it is perfectly proper that a second opinion should be taken. Where numerous respondents all in the same interest are brought before the court, the proper course is to serve them with a notice that, in the event of the appeal being dismissed, the court will be asked to allow only one set of costs. The trustees, however, should always be represented, and their costs will come out of the estate.

[EDITORIAL NOTE.] A person made a party to litigation is *prima facie* entitled to appear and to be represented by his own solicitor and counsel. His opponents can seek to limit their liability to pay his costs by giving a notice that parties whose interests are the same should not be separately represented and that the court will be asked to allow only one set of costs. If this contention is well-founded, the court will generally allow only one set of costs, but the matter is wholly in the discretion of the court.

AS TO COSTS OUT OF THE ESTATE, see HALSBURY, *Hailsham Edn.*, Vol. 14, pp. 453-460, paras. 865-882; and FOR CASES, see DIGEST, Vol. 24, pp. 843, 844, Nos. 8771-8785.]

APPEAL by the defendant Leahy from a decision of FARWELL, J.,

dated Mar. 18, 1940. The appeal is reported only on the question of the costs of the appellant where an appeal upon a question of construction fails.

R. W. Goff for the appellant.

Lindsay M. Jopling (for *Andrew Clark* on war service) for the trustees.

- A *C. V. Rawlence* (for *B. S. Tatham* on war service), *R. F. Ormrod*, *A. C. Nesbitt* (for *L. S. Falk* on war service), *A. A. Baden Fuller*, *H. O. Danckwerts* (for *Herbert Hart* on war service), and *J. Norman Daynes, K.C.*, and *J. M. Paterson* for other parties.

- B *Goff*: First, this is a case in which the court can exercise a discretion to allow the costs out of the estate. Alternatively, there should only be one set of costs in this case, because in a construction case anyone who is served may appear, if so minded, and the costs come out of the estate on an appeal, if the appeal is dismissed with costs.

- C *Daynes, K.C.*: The appeal should be dismissed with costs, and provision should be made for party-and-party and solicitor-and-client costs in the case of the trustees, and, if the other people agree, in the case of the last 4 defendants, but not in the case of the other defendants.

- D *SCOTT, L.J.*: The trustees will get their costs out of the estate. The appeal will be dismissed with costs. The trustees will get the difference between party-and-party costs and solicitor-and-client costs out of the estate.

- E *CLAUSON, L.J.*: I agree with what *SCOTT, L.J.*, has said in regard to costs. Counsel for the appellant has invited us to exercise the jurisdiction which undoubtedly we have to order the costs of an unsuccessful appeal to be paid out of the estate. It is most important that there should be no mistake about the power of the court to order that, and it is equally important that we should be quite clear that it is to be exercised only in the proper cases. The cases where the court will exercise that power are, I think, exceptional. Sometimes there are cases where large interests are at stake, very often interests of unborn persons and so on, and it is perfectly proper that a second opinion should be taken. In cases of that kind, the court does make this exception. In this particular case, the point was quite fairly brought before the court by the trustees.
- G There is an appeal, which has been argued, and which is without foundation. In those circumstances, I cannot conceive of any course being taken except that of ordering the unsuccessful appellant to pay costs. There is one other point I wish to deal with, and that is this. Numerous respondents have been brought before the court, and they are all in the same interest in the matter. It is, of course, the duty of the appellant to bring before the court upon the appeal everyone who will be affected by the appeal, but it is always open to him to seek to protect himself against liability for costs by informing the various respondents that he will ask the court, should the appeal be dismissed, to allow only one set of costs against him. For instance, he may, in a proper case, give

notice to the trustees that he will object to being made liable for the costs of the trustees, on the ground that the point can perfectly well be dealt with by the Court of Appeal, notwithstanding that the trustees are not represented by counsel, and, if such a notice is given, the court will have regard to it, and will see that an appellant who has tried to protect himself against excessive costs is not unduly burdened. As regards the duty of those who advise respondents, I am bound to say that I think that there are many cases in which those who advise them ought to put their heads together and arrange that there should not be an excessive appearance by counsel who either will not be heard at all or will be heard only very perfunctorily. When a man is made a party to litigation, he is *prima facie* entitled to appear, and it is only if there are some circumstances which make it unreasonable for him to appear that, if he succeeds, he should be deprived of his costs. One of those circumstances might well be the giving of a notice by the other side. I can imagine cases in which the appearance was so unnecessary that the court would of its own motion, without any notice having been given, think that it was not proper that the appellant should be burdened by costs incurred unnecessarily. Speaking for myself, I do not think that one can get any nearer to the point than to say that there must always be a certain amount of latitude. In this particular case, I feel no hesitation whatever in agreeing with the order that the appeal should be dismissed with costs.

LUXMOORE, L.J.: I agree entirely with what CLAUSON, L.J., has said. With regard to costs in these matters, if they are limited to questions arising in bulk on an originating summons, where there are necessarily numerous persons many of them having exactly the same interest, it is always open to an appellant, I think, to give to the other parties a notice that he will object to more than one set of costs being allowed to the respondents who are all in the same interest. The matter is then considered by the court, and, if the court comes to the conclusion that it was not right for the parties to be separately represented, it may decide appropriately. With regard to the question of appearance by the trustees, although it used to be the practice, in cases where notice had been given, on occasions to deprive the trustees of their costs, I think that the more recent practice has been to say that the trustees ought to appear in the Court of Appeal, because it is necessary for them to see that the order which relates to the administration of the estate is properly carried out. I think that it would be contrary to modern practice to deprive the trustees on an originating summons of their costs in the Court of Appeal.

Solicitors: *Lithgow & Pepper* (for the appellant); *Stanley Johnson & Allen* (for the trustees); *Tamplin, Joseph, Ponsonby, Ryde & Flux*; *E. S. Read*; *Sharpe, Pritchard & Co.* (for the other parties).

[Reported by W. K. SCRIVENER, ESQ., *Barrister-at-Law.*]

Re THORNHILL'S SETTLEMENT.

[CHANCERY DIVISION (Bennett, J.), July 16, 17, August 20, 21, 1940.]

Settlements—Powers of tenant for life—Bankrupt tenant for life—Order giving powers to trustee of settlement—Jurisdiction of court—Settled Land Act, 1925 (c. 18), s. 24 (1).

A The respondent was tenant for life under a settlement dated Feb. 5, 1906, and had been adjudicated bankrupt in 1924 and 1939. The Official Receiver, his trustee in the second bankruptcy, asked for an order under the Settled Land Act, 1925, s. 24, that the Public Trustee, the trustee of the settlement, should be at liberty to exercise on behalf of the respondent the powers of a tenant for life over the settled land, and for delivery up of documents of title to the Public Trustee by the tenant for life. The respondent had allowed the settled land to become derelict, and had on three occasions unreasonably refused to exercise the powers of a tenant for life, notably by refusing an offer to let two farms and some allotments, and by refusing to deal with the War Office when they served a requisitioning notice upon him:—

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C **HELD:** the conduct of the tenant for life in allowing the property to become derelict was not sufficient to justify the exercise by the court of its powers under the Settled Land Act, 1925, s. 24, but his refusal to exercise his powers as tenant for life justified the exercise of those powers and an order must be made that the trustee of the settlement might exercise specified powers and for delivery up of the documents of title to him.

D **[EDITORIAL NOTE.** The jurisdiction of the court under the Settled Land Act, 1925, s. 24, is one given to it for the first time under that Act. The judgment in the present case points out that the jurisdiction of the court must be founded upon a refusal by the tenant for life to exercise the statutory powers of a tenant for life, and it is not sufficient that he has wholly neglected the settled land.

E **AS TO POWER OF COURT WHERE TENANT FOR LIFE HAS PARTED WITH HIS INTEREST,** see HALSBURY, Hailsham Edn., Vol. 29, p. 681, para. 960; and FOR CASE, see DIGEST, Vol. 40, p. 731, No. 2617.]

F **ORIGINATING SUMMONS** issued by the Official Receiver for an order that the Public Trustee, the trustee of the settlement of which the respondent Michael Christopher Wright McCreagh was tenant for life, might be at liberty to exercise in the name and on behalf of that respondent all the powers of a tenant for life under the Settled Land Act, 1925, in relation to the settled property, and that that respondent should deliver up to the Public Trustee all documents of title relating to the settled land. The facts are fully set out in the judgment.

G *Alexander Grant, K.C., and Hubert A. Rose* for the applicant and for the Official Receiver.

R. H. Hodge and L. R. Norris for the first respondent, the Public Trustee.

H The second respondent appeared in person.

BENNETT, J.: This is an application by the trustee of the property of Michael Christopher Wright McCreagh, a bankrupt, asking for an order under the Settled Land Act, 1925, s. 24, that the Public Trustee, the trustee for the purposes of the Settled Land Act, 1925, of a settlement dated Feb. 5, 1906, may be at liberty to exercise, in the name and

on behalf of the respondent Michael Christopher Wright McCreagh, the tenant for life under that settlement, the powers of a tenant for life under the Act in relation to the property subject to the settlement during the life of Michael Christopher Wright McCreagh or until further order, and for ancillary relief.

The section which founds the jurisdiction—namely, the Settled Land Act, 1925, s. 24 (1)—provides as follows :

If it is shown to the satisfaction of the court that a tenant for life, who has by reason of bankruptcy, assignment, incumbrance, or otherwise ceased in the opinion of the court to have a substantial interest in his estate or interest in the settled land or any part thereof, has unreasonably refused to exercise any of the powers conferred on him by this Act, or consents to an order under this section, the court may, on the application of any person interested in the settled land or the part thereof affected, make an order authorising the trustees of the settlement to exercise in the name and on behalf of the tenant for life, any of the powers of a tenant for life under this Act, in relation to the settled land or the part thereof affected, either generally and in such manner and for such period as the court may think fit or in a particular instance, and the court may by the order direct that any documents of title in the possession of the tenant for life relating to the settled land be delivered to the trustees of the settlement.

The jurisdiction arises if the tenant for life is a bankrupt and has acted unreasonably. The tenant for life, McCreagh, is a bankrupt. He has been bankrupt twice. He was first adjudicated on Feb. 3, 1924, and he was adjudicated for the second time on Sept. 13, 1939. There are still creditors in the second bankruptcy.

The real question which I have to determine is whether the applicant has satisfied me that the tenant for life, the bankrupt, has unreasonably refused to exercise the powers which the Settled Land Act, 1925, gives to him as a tenant for life. The settled land consists of about 3,000 acres of agricultural land in the county of Southampton. It is known as Drayton Lodge Estate, and is situate for the most part in the parish of Barton Stacey and that of Wonston, in the county of Southampton. On Feb. 5, 1906, the land was conveyed by the bankrupt's mother to uses under which the bankrupt is tenant for life in possession. For some reason or another which has not been made plain to me, since the date of that settlement the bankrupt has had some grievance, because, when the estate was conveyed to him, it was conveyed to him as a limited owner, and the evidence shows that since the date of the settlement his conduct in relation to the settled land has been abnormal. I am not concerned with that, except for the purpose of bearing it in mind when considering whether or not it has been proved that the bankrupt has been acting unreasonably in regard to his refusal to exercise his powers as tenant for life.

There is evidence which satisfies me that for some years past the land comprised in the settlement has been neglected—terribly neglected, according to the evidence of Alan Arnold, a well-known land agent, who carries on his business in Winchester. In an affidavit which was filed on Aug. 2, 1940, Arnold says :

. . . the estate has during the last 15 years been allowed to go out of cultivation,

although some attempt appears to have been made to bring one or two of the derelict farms back into cultivation during the past year or two. Having made a careful inspection of the estate, I am bound to say I have never in all the course of my long experience seen a property in such an uncared for and desolate state. Farm-houses and cottages have either fallen down or are in such a dilapidated condition that repairing them is out of the question. Squatters have taken possession of cottages and large areas of land were uncultivated, hedges have grown out into the fields and the gates and fences have disappeared. Trees have fallen down and have been left where they fell, in some cases blocking the farm roads. The rivers, water-courses, hatches, bridges and drains in the meadows are all in a neglected state. In my opinion, it is plain that whoever was responsible for the management and administration of this fine Hampshire estate has totally neglected his duties. There is plain evidence of an utter disregard for either the condition of the land or the state of the buildings and it is difficult to estimate the great depreciation in value that has taken place, entirely due to the gross mismanagement of past years. It is distressing to realise that 3,000 acres of good farming land should have been allowed to fall into such a derelict condition.

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- I think that probably the fact that it has been allowed to fall into that condition is due to some grievance which the bankrupt thinks that he has, because of the settlement made upon him by his mother on Feb. 5, 1906. The fact that the land has been allowed to fall into this deplorable condition is not a ground for exercising the jurisdiction which the Settled Land Act, 1925, s. 24, confers upon this court. I have to be satisfied by evidence that the tenant for life has unreasonably refused to exercise the powers which that Act gives him—namely, the powers of sale and the powers of leasing, and other powers concerned with the disposal of the land comprised in the settlement.

- E
- There are three respects in which, in my judgment, the applicant has proved that the bankrupt has unreasonably refused to exercise his powers. The first is in relation to two farms, known as Upper and Lower Cranbourne Farms. The bankrupt was approached in the summer of 1939 by one R. M. Paterson, who desired to become a tenant of those two farms, which were then vacant and derelict.

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- In an affidavit filed on May 8, 1940, Paterson deposes to the fact that he decided that, if he could obtain reasonable terms from the landlord, he would attempt to bring back Upper and Lower Cranbourne Farms into a proper state of cultivation. He deposes to the fact that he was informed by one Williamson, the assistant county agricultural organiser for the county of Southampton, that one Notley was acting for the bankrupt. In para. 4 of his affidavit, he swears to these facts :

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- On Sept. 21, 1939, I went to Cocum Farm to see Mr. Notley and then asked him to make an appointment for me to meet Mr. McCreagh in London. No appointment was made and on Sept. 26, 1939, I, together with Mr. Notley, journeyed to London and met Mr. McCreagh at his office 32, Victoria Street, S.W.1. I informed Mr. McCreagh of my intentions and asked him if he would let the farms to me. He replied, however, that, although he owned the sporting rights, he did not own the farms. We discussed the question concerning the payment of tithe and Mr. McCreagh stated that no one could be found to pay this. At the conclusion of our interview, Mr. McCreagh said to me : " If I were you, I would take possession of the farms and inform the Agricultural Committee that you have done so."

This affidavit proves, in my judgment, that the bankrupt refused to let these two farms to Paterson, and the question is whether or not, in refusing to let those two farms to Paterson, the bankrupt was acting unreasonably.

The bankrupt seeks to justify his conduct by reference to an alleged conveyance, which he says that he made on Aug. 17, 1923, his first bankruptcy having occurred on Feb. 3, 1924. The conveyance which he relies upon as justifying his refusal to let the farms to Paterson is a conveyance by him to his mother of some hereditaments in the parish of Wonston in the county of Southampton which comprise these two farms. It is a conveyance which, from the time it was executed by McCreagh, remained in his possession. He never communicated the fact of the conveyance to his mother. As far as I can see, he had no power whatever as tenant for life under the settlement of Feb., 1906, to make the conveyance, and, if it ever was an effective conveyance (which I doubt), it was voided by the Bankruptcy Act, 1914, s. 42, when McCreagh was adjudicated bankrupt, on Feb. 3, 1924. A B

Nobody, I think, who has heard the attempts which, in the course of arguing his case before me, the bankrupt has made to justify his conduct, would arrive at any conclusion other than that his refusal to let these two farms to Paterson was unreasonable. It was based solely upon some obsession in regard to the settlement made upon him by his mother in Feb., 1906. Therefore, I decide that, in refusing to exercise his statutory powers of letting these two farms to Paterson, the respondent was acting unreasonably. C D

The second matter is in regard to the requisition of land by the War Office in Sept., 1939. The War Office wanted to acquire some of the settled land, and they served a requisition notice upon the bankrupt in respect of it. The requisition included a farm known as Drayton Pump Farm. The respondent refused to deal with the War Office, basing his refusal on the ground that he was not in possession of that farm, which was in possession of a tenant of his named Carleton. At one time, I was impressed by the argument of McCreagh in respect of that matter. He is a plausible person. He is a member of the bar and has some knowledge of the law. The fact is that, if one looks at Arnold's affidavit, the man who McCreagh says was his tenant had vacated the farm some years ago, and, when Drayton Pump Farm was requisitioned by the War Office, it was vacant. To suggest, as McCreagh did, that it was not in his possession, but was in that of Carleton, was to suggest something which was quite untrue. I conclude in relation to that matter that McCreagh as tenant for life was acting unreasonably. E F G

The third respect—it is a small matter—in which it has been proved that the bankrupt has been acting unreasonably is in regard to the allotments. These he has refused to let, and his excuse is that the allotments are no concern of the tenant for life, but are something in which his tenant farmers are alone concerned. In regard to the refusal to let Upper and Lower Cranbourne Farms to Paterson, the refusal to negotiate with the War Office in relation to Drayton Pump Farm, and the refusal to let the allotments, in my judgment, the bankrupt has been proved to have unreasonably refused to exercise his powers. H

On the evidence, I think that it is plain that, in the interests of everybody interested in the settled land, an order should be made authorising the trustees of the settlement to exercise on behalf of the tenant for life some of the tenant for life's powers. I do not propose, as at present advised, and on the evidence before me, to make an order which will

A authorise the trustees of the settlement to exercise powers of sale over the whole of the settled land, because, as I understand it, the settled land has been in the possession of the ancestors of the present tenant for life since the days of King John. It may well be that the bankrupt might have objections founded on reason against the whole of the estate

B being disposed of. The order which I propose to make under the section is one which will enable the trustee of the settlement, the Public Trustee, to exercise, in the name and on behalf of the tenant for life, the powers of sale in relation to any of the land comprised in the settlement and requisitioned by or on behalf of the War Office, and the powers of the

C tenant for life to lease any part of the settled land and to exercise all powers conferred upon a tenant for life by the Act ancillary to the powers of leasing. I will also make an order that the tenant for life deliver to the trustee documents of title in his possession relating to the settled land.

D *Order granted that the Public Trustee exercise on behalf of the tenant for life powers of leasing as to the whole of the settled land, powers of sale as to part of it, powers ancillary thereto, and power to direct investments of capital money. Order that delivery up of documents of title be made to Public Trustee.*

E Solicitors: Tarry, Sherlock & King (for the applicant); Farrer & Co. (for the first respondent):

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

PUNJAB CO-OPERATIVE BANK, LTD., AMRITSAR v. INCOME TAX COMMISSIONER, LAHORE.

[PRIVY COUNCIL (Viscount Maugham, Lord Russell of Killowen, Lord Wright, Sir George Rankin and Mr. M. R. Jayakar), **June 25, 26, 27, July 22, 1940.**]

G *Privy Council—India—Jurisdiction—Appeals from High Court of India—Case not involving interpretation of Government of India Act, 1935—Whether High Court should make order withholding certificate that case does not involve such interpretation—Government of India Act, 1935 (c. 42), s. 205.*

H The appellants claimed that they had been wrongly assessed to income tax in respect of the sum of Rs.1,42,588, which represented a profit they had made as between the selling price and the cost price of certain securities. They claimed that this sum did not form part of their profits in their business of banking. On the hearing of the appeal, the respondents, besides contending that the buying and selling of securities constituted part of the appellants' business, took the preliminary point that, by virtue of the Government of India Act, 1935, s. 205, no appeal now lies to His Majesty in Council from any judgment, decree or final order made by any High Court in British India unless that

court has recorded that it withholds the giving of a certificate that a substantial question of law as to the interpretation of the Act is involved :—

HELD : (i) if a certificate is granted, appeal lies to the Federal Court, and there is no question of the jurisdiction of His Majesty in Council.

(ii) if, in the absence of a certificate, it appears to the Board on an appeal that the case may or does involve a substantial question of law as to the interpretation of the Act, then, although the Board strictly has jurisdiction to hear the appeal, it ought not to do so until the High Court has had an opportunity of either granting or refusing the certificate. A

(iii) the duty of granting or refusing a certificate is imposed on the High Court only in cases where there is a reasonable possibility that such question of law may arise. In all other cases, appeal will lie direct to His Majesty in Council, without the necessity of the High Court making an order withholding the certificate. B

(iv) the buying and selling of securities constitutes part of the normal business of banking.

[EDITORIAL NOTE.] The effect of the Government of India Act, 1935, s. 205, was in question in *Mackay v. Forbes* (1). There the decision of the Judicial Committee was shortly stated and appears capable of being misinterpreted. The matter is more fully considered here, and, in effect, the section is held not to take away any jurisdiction the Committee has to hear appeals. C

AS TO APPEALS FROM INDIA, see HALSBURY, Hailsham Edn., Vol. 11, pp. 221, 222, paras. 425-428; and FOR CASES, see DIGEST, Vol. 17, pp. 499-501, Nos. 630-653.]

Cases referred to :

- (1) *Mackay v. Forbes* (1940), 67 Ind. App. 64; [1939] 4 All E.R. 368; Digest Supp. D
- (2) *Middlesex JJ. v. R.* (1884), 9 App. Cas. 757; 42 Digest 629, 316; 53 L.J.Q.B. 505; 51 L.T. 513; *affg.* (1883), 11 Q.B.D. 656.
- (3) *Woodward v. Sarsons* (1875), L.R. 10 C.P. 733; 42 Digest 711, 1279; 44 L.J.C.P. 293; *sub nom.* *Woodward v. Sarsons & Sadler, Birmingham Municipal Election Petition Case*, 32 L.T. 867. E
- (4) *Mounicashell v. O'Neill* (1854), 3 L.Ch.R. 619; 28 Digest 392, case 209 *iv.*
- (5) *Walter v. Rumball* (1695), 4 Mod. Rep. 385; 18 Digest 337, 719; *sub nom.* *Walker v. Rumbald*, 12 Mod. Rep. 76.
- (6) *Jarvis v. Hemmings*, [1912] 1 Ch. 462; 18 Digest 308, 436; 81 L.J.Ch. 290; 106 L.T. 419. F
- (7) *Quinn v. Leathem*, [1901] A.C. 495; 42 Digest 971, 30; 70 L.J.P.C. 76; 85 L.T. 289.
- (8) *Californian Copper Syndicate, Ltd. v. Harris (Surveyor of Taxes)* (1905), 5 Tax Cas. 159; 28 Digest 23, case b.
- (9) *Taxes Comr. v. Melbourne Trusts, Ltd.*, [1914] A.C. 1001; 28 Digest 18, case 92i; 84 L.J.P.C. 21. G
- (10) *Inland Revenue Comrs. v. Scottish Automobile & General Insurance Co. Ltd.* (1931), 16 Tax Cas. 381.

APPEAL by the taxpayers from a judgment of the High Court of Lahore, dated Feb. 3, 1938, delivered on a reference under the Indian Income Tax Act, 1922, s. 66 (2), by the Commissioner of Income Tax, H Punjab, North-West Frontier and Delhi Provinces. The facts and the arguments are fully set out in the judgment of their Lordships delivered by VISCOUNT MAUGHAM.

Raymond W. Needham, K.C., and *N. E. Mustoe* for the appellants.
J. Millard Tucker, K.C., and *W. Wallach* for the respondent.

VISCOUNT MAUGHAM: This is an appeal from a judgment of the High Court of Judicature at Lahore, dated Feb. 3, 1938, delivered on a reference under the Indian Income Tax Act, 1922 (XI of 1922), s. 66 (2), by the Commissioner of Income Tax, Punjab, North-West Frontier and Delhi Provinces. The appellant (hereinafter referred to as the bank) is a joint stock company, incorporated in 1905, carrying on the business of banking. The objects for which the bank was established are set out in para. 3 of its memorandum of association, and include the following :

(a) To carry on in India and elsewhere the trade or business of banking in all its branches, and to transact and do all matters and things incidental thereto, or which may at any time hereafter be usual in connection with the business of banking or dealing in money or securities for money.

Para. 82 (i) of the articles of association provides that the directors :

... may invest funds of the company upon such securities or investments as they may think advisable; from time to time, vary such securities and investments, and convert the same, as occasion may require or as they may deem expedient, but they shall not invest or employ any part of the funds of the company in the purchase of its own shares.

The profits of the bank derived from its business during 1935 were assessable to income tax in the year 1936-37, which is the year of assessment involved in this appeal.

On Feb. 3, 1938, the High Court decided that, on the facts stated in the statement of the case drawn up by the commissioner of income tax under the Indian Income Tax Act, 1922, s. 66 (2), a question propounded by the commissioner must be answered in the affirmative, with the result that the amount of Rs. 1,42,588 realised by the bank on the sale in 1935 of certain securities and shares over their cost price is taxable as part of the profits or gains of the business of the bank which arose in 1935: see the Indian Income Tax Act, 1922, s. 10. On June 17, 1938, the High Court certified under the Indian Income Tax Act, 1922, s. 66A, on the petition of the bank, that the case was a fit case for appeal to His Majesty in Council. As it happened, the two judges who gave this certificate were those who heard and decided the case on Feb. 3, 1938.

On the appeal coming on for hearing before their Lordships, a preliminary objection to the appeal was taken which has been elaborately argued, and it seems desirable in the first place to deal with this objection. It is based on the contention that no direct appeal now lies to His Majesty in Council from any judgment, decree or final order made by any High Court in British India unless that court has recorded that it *withholds* the giving of a certificate that a substantial question of law as to the interpretation of the Government of India Act, 1935, is involved. That is said to be the effect of sect. 205 of the Act, and reliance is placed on a decision of their Lordships in a recent case which must be considered later. Sect. 205 provides as follows :

(1) An appeal shall lie to the Federal Court from any judgment, decree or final order of a High Court in British India, if the High Court certifies that the case

involves a substantial question of law as to the interpretation of this Act or any order in council made thereunder, and it shall be the duty of every High Court in British India to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly. (2) Where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided, and on any ground on which that party could have appealed without special leave to His Majesty in Council if no such certificate had been given, and, with the leave of the Federal Court, on any other ground, and no direct appeal shall lie to His Majesty in Council, either with or without special leave. A

The object of this section is plain. It is to ensure that, in every proceeding where a judgment, decree or final order is made by any High Court in British India which involves a substantial question of law as to the interpretation of the Act or any order in council made thereunder (which for brevity will be referred to hereafter as the specified question of law), the appeal, if any—that is, the direct appeal—shall lie to the Federal Court. The word “direct” is used because sect. 208 makes provision for an appeal in such a case, on certain conditions, from a decision of the Federal Court to His Majesty in Council. However, nothing turns on this for the present purpose. The means adopted in the section to carry out the above object are these: (1) The appeal is stated to lie to the Federal Court if the High Court certifies that the specified question of law is involved and is a substantial question. (2) A duty is imposed on the High Court of its own motion to give or to withhold a certificate that the specified question of law, being a substantial question, is involved. This part of subsect. (1) contains some other important words which will be considered later. (3) Where such a certificate is given, any party in the case may appeal to the Federal Court on defined grounds (subsect. (2)). (4) Where such a certificate is given, no (direct) appeal shall lie to His Majesty in Council even with special leave (subsect. (2)). It is clear that the section does not provide for a case where no such certificate is given, however plain it may be that it ought to have been given. There is no provision, express or implied, taking away from His Majesty in Council the right to entertain a direct appeal in such case, and *a fortiori* there is nothing taking away the right of direct appeal to His Majesty in Council in a case where no substantial question of law of the specified character could by any reasonable possibility arise. C D E F

What then is the position if it becomes manifest to the Board that, by some mischance or inadvertence or forgetfulness, the High Court has neglected its duty under the latter part of subsect. (1) to give a certificate in a case where the specified question of law is, or may reasonably be, involved? It is plain that it is for the High Court, and not for this Board, to determine whether the question is involved, and, if so, whether it is substantial. In such an event, although the jurisdiction of His Majesty in Council has not been affected, since there has been no certificate, nevertheless there has been a dereliction of duty by the High Court, and the Board, in accordance with the principles on which it is accustomed to act in tendering advice to His Majesty, would not G H

think it right to hear the appeal until a proper certificate had been obtained, or until it was on record that a certificate had been withheld.

The precise event in fact happened in *Mackay v. Forbes* (1). It seemed to the Board that a question of interpretation arose under an order in council made by virtue of the Government of India Act, 1935, s. 293.

- A There was no certificate by the High Court. It was suggested by counsel for the appellants that the court might have considered sect. 205, and might have decided to withhold a certificate, though that decision was not expressed. Their Lordships expressed the view that this was unlikely in that case, and, in the absence of a certificate, they thought
- B that the appeal should be dismissed with costs. They added, however, that, if the High Court should thereafter make an order withholding a certificate under sect. 205, the appellants were to be at liberty to apply to His Majesty in Council to have the appeal restored. Their Lordships are of opinion that this order was perfectly correct, not because sect. 205
- C took away the jurisdiction in a strict sense of His Majesty in Council, but for the more general reason indicated above. They will add that the course taken of dismissing the appeal was no doubt to some extent due to the circumstance that the Board entertained little doubt that the certificate would be given. If the case had been one in which there
- D was a real doubt whether the certificate would be given or withheld, a more lenient course might have been taken, and the appeal might have been directed to stand over until the High Court had either given a certificate or decided to withhold it.

- E It remains to consider what the position is, and what course should be taken by the Board, when the appeal is from the High Court and no such specified question of law can with any reasonable probability be thought to be involved, and where, not unnaturally, the High Court have neither granted a certificate nor recorded that a certificate is withheld. The first question here is whether, in such a case, sect. 205 applies
- F at all, and at this point it is necessary to examine the language in the latter part of subsect. (1) in order to determine the nature of the duty imposed upon the High Court. The language is of a very comprehensive kind. The duty is to be that of "every High Court in British India." It is to consider "in every case" whether or not the specified question
- G is involved, and finally the court is "of its own motion" to give or to withhold a certificate accordingly. Their Lordships, however, are of opinion that this part of subsect. (1) is directory in the sense in which that word is used in the well-known distinction between enactments, or phrases in them, which are mandatory or absolute and those which are merely directory. There are several reasons for this conclusion—
- H namely, (i) the object of sect. 205 is as above stated, (ii) the circumstance that the duty is imposed on the judges of the High Court, persons occupying positions of great importance and dignity to whom mandatory clauses would not be addressed without strong reason, and (iii) that, in fact, there is no provision whatever for imposing any penalty or depriva-

tion of right on a litigant, if the High Court should neglect to comply with its judicial duty as laid down in the section. In other words, the duty is imposed on the judges for the purpose of ensuring that, if the case involves the specified question of law, the High Court will carry out the intention of the section by giving a certificate which will ensure that the appeal, if any, shall be to the Federal Court. However, there is no condition precedent imposed on an appeal to His Majesty in Council in the absence of a certificate. The responsible persons—in this case the judges of the High Court—may be “blameable,” as LORD BLACKBURN observed in the instructive case of *Middlesex JJ. v. R.* (2), at p. 778, but third parties have nothing to do with that.

If the sentence imposing the duty is only directory, as their Lordships think is clear for the reasons stated, an important consequence follows. It is a well-settled general rule that, as was said by LORD COLERIDGE, C.J., in *Woodward v. Sarsons* (3), at p. 746 :

... an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially: see *Mountcashell v. O'Neill* (4), at p. 955.

It is sufficient if the plain object of the directory provision is carried out: *Walter v. Rumball* (5) and *Jarvis v. Hemmings* (6). If these principles are applied in the present case, it will be apparent that the following alternative view arises. Either sect. 205, in imposing on the High Court the duty of giving or withholding a certificate, is doing so only in cases where there is a reasonable possibility that the specified question arises, or may arise, or, alternatively, the duty is one which need only be complied with in such a case. It is plain that in the vast majority of cases no such question can arise. It seems to their Lordships most difficult to believe that the legislature was intending to lay on the judges of every High Court an obligation as part of their judicial duties to record their intention to “withhold” a certificate in such cases as an ordinary judgment on a criminal trial, or a libel action, or a decree or judgment in an everyday case for the recovery of a trifling sum of money, for example, in a normal action for a debt. Their first duty is “to consider,” but only, it would seem, when there is in fact something to consider. Their Lordships have come to the conclusion that the duty imposed on the judges by words of a directory character is one which arises only in a case where there is some reasonable ground for thinking that the specified question may be involved. The conclusions on this matter of the construction of sect. 205 are, accordingly, these. First, no question of the jurisdiction of His Majesty in Council can arise unless there is a certificate, in which case the direct appeal lies to the Federal Court. Secondly, if, in the absence of a certificate, it appears to the Board on an appeal that there is ground for thinking that there is a matter for the consideration of the High Court, and that they ought to have given or to have withheld a certificate, the Board ought to decline to hear the appeal until the

High Court have had an opportunity of doing one or the other. Thirdly, the section, on its true construction, is dealing only with cases where there is a reasonable possibility that the specified question may arise, and the duty is imposed on the judges of the High Court only in those cases.

- A Their Lordships desire to add that *Mackay v. Forbes* (1) related to a case within the second of these propositions. The remarks of the Board as regards the duties of the judges of the High Court must be read as confined to cases of the nature of that which arose in that case, and in that connection reference may be made to the remarks of LORD
B HALSBURY in *Quinn v. Leathem* (7), at p. 506, that every judgment must be read as applicable to :

... the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed or qualified by the particular facts of the case in which such expressions are to be found.

- C It may be well to add that their Lordships do not differ from the opinion expressed in that case as to the duty of the judges of the High Court in a case to which the section is applicable to record a determination to withhold a certificate if they think that that is the right course. Prefer-
D ably, that should be done by the judges who have heard the case, but it is not essential in every case, and may sometimes be impossible, for example, when there are two judges who differ on the question whether the certificate should be given or withheld. It may be noted that in
E *Mackay v. Forbes* (1) their Lordships provided for the event of the High Court making an order at some later date withholding the certificate in question, and that order doubtless could be made by judges other than those who delivered the original judgment. It follows from the above observations that the preliminary objection fails, since, in the present case, there is no possible ground for thinking that any question,
F still less a substantial one, as to the interpretation of the Government of India Act, 1935, can be involved.

- Two other matters were argued on the preliminary objection—namely, (i) whether a decision on a reference under the Indian Income Tax Act, 1922, s. 66 (2), is “a judgment, decree, or final order” within the meaning
G of those words in sect. 205, and (ii) whether the certificate given as above-mentioned on June 17, 1935, under the Indian Income Tax Act, 1922, is not a sufficient proof that the certificate under the Government of India Act, 1935, s. 205 (if the section was applicable), had been withheld. On these two questions their Lordships do not think it necessary
H to express any opinion.

I come now to the appeal by the bank. It may be observed that the High Court rightly appreciated that the question was ultimately one of fact, to be decided on the findings of the commissioner under the Indian Income Tax Act, 1922, s. 66 (2), and that the appellant bank had to establish either that the commissioner had misdirected himself on some

question of law or that there was no sufficient evidence to justify his findings. Their Lordships note that the High Court, in deciding that neither of these points had been made good, examined and considered a number of cases, most of which related to insurance companies and banks. Their Lordships do not propose to attempt to reconcile all these decisions and the various *dicta* which are to be found in the reports of them, which might, indeed, prove to be an impossible task, and they will add that the cases relating to insurance companies largely turn on the nature of the insurance business actually carried on and the way in which reserve funds have been set aside and dealt with. A

In the present case, it appears that on Dec. 31, 1934, the value of the investments of the bank amounted to Rs.50,88,550, mainly held in Indian government securities, which, being readily saleable, could be promptly realised, if necessary, in order to pay claims. During 1935, some 10 lacs of these government securities and some shares were sold, and the profit made, taking the differences between the cost price of the investments and the prices at which they were sold, was Rs.1,42,588. The grounds on which the bank contends that the profit of Rs.1,42,588 made on the sale of some of its securities in 1935 does not form part of the profits of its business of banking are succinctly stated thus, in the statement of the case—namely, that the bank had treated the investments in shares and securities as a reserve for emergencies, and had resorted to their sale in the accounting period 1935 because they had in that year to meet heavy withdrawals of deposits and to deposit Rs.2,66,000 with the Reserve Bank of India under the provisions of the Reserve of India Act, 1934, s. 42 (1). The bank claimed also that it did not “deal in shares and securities,” and that, therefore, the profit made by the sale of shares and securities was not taxable. B C D E

In the statement, the commissioner finds that up to 1933 there was no sale of securities. The first sale took place on Nov. 30, 1934. On the other hand, he declines to accept the contention that the bank had to sell the securities in order to meet heavy withdrawals of deposits and to make the compulsory deposit with the Reserve Bank of India. He states from an examination of the books that it is clear that the profits realised by selling shares and securities were utilised in increasing the reserves. A general view of the financial position since 1932 as on Dec. 31 of each year can be gathered from a table contained in the statement, which is as follows : F G

Accounting year.	Assessment year.	Deposits in Thousands. Rs.	Investments in Thousands. Rs.	Total reserve in Thousands. Rs.
1932	1933-4	11,543	4,584	997
1933	1934-5	12,361	4,931	1,041
1934	1935-6	11,882	5,088	1,043
1935	1936-7	11,310	3,859	1,234

It is apparent that the decrease of deposits in 1935 as compared with the previous year is roughly 5 per cent., while the decrease in investments H

as between the two years is more than 20 per cent. So far from there being a finding that the sales of shares and securities were due to any special emergency, the commissioner says that it is apparent that the bank had been selling the shares and securities in order to take full advantage of the high prices prevailing in 1935. He was of opinion that the bank had been "carrying on business in shares and securities since the closing months of 1934." This may well be the correct view, and a sufficient ground for dismissing this appeal, but their Lordships do not wish to give any support to the contention that, in order to render taxable profits realised on sales of investments in such a case as that before them, it is necessary to establish that the taxpayer has been carrying on what may be called a separate business either of buying or selling investments or of merely realising them.

The principle to be applied in such a case is now well-settled. It was admirably stated in *Californian Copper Syndicate, Ltd. v. Harris (Surveyor of Taxes)* (8), and the statement has been more than once approved both in the House of Lords and in the Judicial Committee: see, for example, *Taxes Comr. v. Melbourne Trusts, Ltd.* (9), at p. 1010. Some dicta which appear to support the view that it is necessary to prove that the taxpayer has carried on a separate or severable business of buying and selling investments with a view to profit in order to establish that profits made on the sale of investments are taxable—for example, the dicta in *Inland Revenue Comrs. v. Scottish Automobile & General Insurance Co.* (10), at pp. 388, 389, cannot now be relied on. It is well established that, to cite the exact words used in the *Californian Copper* case (8), at p. 166:

... enhanced values obtained from realisation or conversion of securities may be so assessable, where what is done is not merely a realisation or change of investment, but an act done in what is truly the carrying on, or carrying out, of a business.

In the ordinary case of a bank, the business consists, in its essence, of dealing with money and credit. Numerous depositors place their money with the bank, often receiving a small rate of interest on it. Numerous borrowers receive loans of a large part of these deposited funds at somewhat higher rates of interest, but the banker has always to keep enough cash or easily realisable securities to meet any probable demand by the depositors. No doubt there will generally be loans to persons of undoubted solvency which can quickly be called in, but it may be very undesirable to use this second line of defence. If, as in the present case, some of the securities of the bank are realised in order to meet withdrawals by depositors, it seems to their Lordships to be quite clear that this is a normal step in carrying on the banking business, or, in other words, that it is an act done in "what is truly the carrying on" of the banking business. This, it appears to their Lordships, is the more appropriate and satisfactory ground for dealing with the question arising in the present case. It accords exactly with one of the findings in the statement of the commissioner agreeing with the

views both of the income tax officer who first dealt with the case and of the assistant commissioner. He observed :

... the purchase and sale of shares and securities are so much linked with the deposits and withdrawals of clients that with the existing articles of association the purchase and sale of shares and securities are as much part of the assessee's business as receiving deposits from clients and paying them off are, and therefore, the profits which arise from the former transactions are as much business profits as the profits arising from the latter transactions are.

There can be no doubt that there is ample evidence to justify this view, and, in their Lordships' opinion, as in that of the High Court, it is sufficient to dispose of this appeal. Their Lordships will accordingly humbly advise His Majesty that the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors : *Douglas Grant & Dold* (for the appellant) ; *The Solicitor, India Office* (for the respondent).

[Reported by CHARLES SHELLEY, ESQ., Barrister-at-Law.]

FORESTAL LAND, TIMBER AND RAILWAYS CO., LTD. v. RICKARDS.

MIDDOWS, LTD. v. ROBERTSON.

W. W. HOWARD BROTHERS & CO., LTD. v. KANN.

[KING'S BENCH DIVISION (Hilbery, J.), August 12, 13, 14, 15, 16, 19, 20, 21, 22, September 6, 1940.]

Insurance—Marine insurance—Cargo—War—Government decree controlling shipping—Ship attempting to return to enemy country in obedience to decree—Scuttling of ship—Frustration of voyage—Liability of insurers of cargo.

A cargo in a German-owned steamship was insured for a voyage from South American ports to Hong Kong or Shanghai, including transshipment at Durban. The policy was in the usual Lloyd's form, but expressly included the Institute War Clauses and the following clause : " Including damage by hook, oil, sweat, heat, fresh water and other cargo (liquid or solid), theft, pilferage and non-delivery . . ." The policy was expressly warranted free of any claim based upon loss or frustration of the insured voyage or adventure caused by arrests, restraints or detention of kings, princes or people. The vessel arrived at Rio on Aug. 25, 1939. War was declared on Sept. 3, 1939. The vessel sailed from Rio on Sept. 6, 1939, and on Sept. 29, 1939, in the presence of a British warship, she was scuttled by her master and crew off the Faroe Islands. At all times after Aug. 16, 1939, the German government had taken control of all German-owned merchant shipping, and had given orders to all such vessels and their masters to take refuge in neutral ports or return to Germany, or, as a last resort, to scuttle their vessels. The plaintiffs claimed for a total loss, either actual when the ship was scuttled or constructive when the ship was at Rio and war broke out, or, at latest, when she sailed from Rio :—

HELD : (i) when the ship sailed from Rio, the master intended to return to Germany with the cargo, and he did so under the instructions of the German government. The loss of the cargo was, therefore, due to the frustration of the adventure by restraint of princes, and the underwriters were not liable on the policy.

(ii) though the loss might be due to arrests, restraint of princes, it was clearly due to the frustration of the adventure, a peril of which the policy was warranted free, and the assured was not entitled to recover.

(iii) the plaintiffs had established, as they were required to do under the Marine Insurance Act, 1906, s. 60 (2) (i), that it was unlikely that they could recover the goods.

(iv) in attempting to return to Germany in face of the blockade, the vessel was engaged in a warlike operation.

(v) the "held covered" clause could not be construed as covering the adventure which the master undertook when he set out from Rio to Germany.

(vi) the actual total loss or capture during warlike operations and the scuttling did not occur while the policy was in operation, because the adventure had been frustrated and the voyage wholly abandoned at Rio.

(vii) the scuttling of the ship was not an act of barratry.

Under a policy similar to the above, goods were shipped on a German-owned vessel for carriage from Bremen to Cape Town. On a normal voyage, the vessel would have reached Cape Town about Sept. 12, 1939, but, having arrived at Las Palmas on Aug. 29, 1939, the vessel then sailed for Vigo, Spain, where she arrived on Sept. 1, 1939. She left Vigo on Feb. 10, 1940, and arrived in Hamburg on Mar. 5, 1940. No notice of abandonment was at any time given to the underwriters, and no extra premium was paid in respect of a change of voyage :—

HELD : the adventure which was the subject-matter of the insurance was frustrated when the master sailed from Vigo, and the underwriters were not after that time at risk with regard to the cargo.

Under a policy similar to the above, goods were shipped on a German-owned vessel for carriage from Bunbury, Australia, to London. The ship passed the Cape of Good Hope on Aug. 18, 1939, and, on a normal voyage, would have reached London about Sept. 16, 1939. She sheltered at the neutral port of Bissao in Portuguese Guinea on Sept. 6, 1939. She left there on Oct. 13, 1939, and was scuttled in the presence of a French warship on Oct. 16, 1939. No notice of abandonment was given, and no extra premium was paid in respect of a change of voyage :—

HELD : the adventure which was the subject-matter of the insurance was frustrated when the master sailed from Bissao, and the underwriters were not after that time at risk with regard to the cargo.

[EDITORIAL NOTE.] On the outbreak of war, it is now customary for the shipping of a belligerent country to be brought under government control. In the present case the instructions from the government included an instruction to scuttle the ship if capture appeared inevitable. The matters arising are more or less covered by authority and the judgment deals with the application of previous decisions to the forms of policy now in use and the circumstances of the present war. It should be noted that some of the points have been dealt with by the judge at the request of the parties and are not essential to the decision in the case.

AS TO WAR RISKS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 314-319, paras. 439-443; and FOR CASES, see DIGEST, Vol. 29, pp. 216-219, Nos. 1720-1758.]

H Cases referred to :

- (1) *British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co.*, [1916] 1 A.C. 650; 29 Digest 276, 2236; 85 L.J.K.B. 550; 114 L.T. 521; *affg.* S.C. *sub nom.* *Sanday & Co. v. British & Foreign Marine Insurance Co.*, [1915] 2 K.B. 781.
- (2) *Atlantic Mutual Insurance Co. v. King*, [1919] 1 K.B. 307; 29 Digest 226, 1839; 88 L.J.K.B. 1001; 120 L.T. 191.

- (3) *Miller v. Law Accident Insurance Co.*, [1903] 1 K.B. 712; 29 Digest 219, 1748; 72 L.J.K.B. 428; 88 L.T. 370.
- (4) *Rodoconachi v. Elliott* (1874), L.R. 9 C.P. 518; 29 Digest 218, 1747; 43 L.J.C.P. 255; 31 L.T. 239.
- (5) *Fooks v. Smith*, [1924] 2 K.B. 508; 29 Digest 276, 2239; 94 L.J.K.B. 23; 132 L.T. 486.
- (6) *Bryant v. Herbert* (1878), 3 C.P.D. 389; 42 Digest 969, 12; 47 L.J.Q.B. 670; 39 L.T. 17.
- (7) *Polurrian S.S. Co., Ltd. v. Young*, [1915] 1 K.B. 922; 29 Digest 273, 2213; 84 L.J.K.B. 1025; 112 L.T. 1053.
- (8) *Britain S.S. Co. v. R., Green v. British India Steam Navigation Co., British India Steam Navigation Co. v. Liverpool & London War Risks Insurance Assocn.*, [1921] 1 A.C. 99; 29 Digest 230, 1860; 89 L.J.K.B. 881; 123 L.T. 721; *affg.*, [1919] 2 K.B. 670.
- (9) *Butler v. Wildman* (1820), 3 B. & Ald. 398; 29 Digest 224, 1817.
- (10) *Hadkinson v. Robinson* (1803), 3 Bos. & P. 388; 29 Digest 208, 1671.
- (11) *Lubbock v. Rowcroft* (1803), 5 Esp. 50; 29 Digest 208, 1670.
- (12) *Kacianoff v. China Traders Insurance Co., Ltd.*, [1914] 3 K.B. 1121; 29 Digest 216, 1727; 83 L.J.K.B. 1393; 11 L.T. 404.
- (13) *Becker, Gray & Co. v. London Assurance Corpn.*, [1918] A.C. 101; 29 Digest 208, 1675; 87 L.J.K.B. 69; 117 L.T. 609; *affg.*, [1915] 3 K.B. 410; [1916] 2 K.B. 156.
- (14) *The Stranna*, [1938] P. 69; [1938] 1 All E.R. 458; Digest Supp.; 107 L.J.P. 33.
- (15) *Wilson, Sons & Co. v. Xantho (Cargo Owners), The Xantho* (1887), 12 App. Cas. 503; 41 Digest 414, 2573; 56 L.J.P. 116; 57 L.T. 701.
- (16) *Zachariessen v. Importers & Exporters Marine Insurance Co.* (1924), 40 T.L.R. 297; 29 Digest 227, 1847.
- (17) *Ionides v. Pender* (1872), 27 L.T. 244; 29 Digest 223, 1808; *previous proceedings*, 26 L.T. 970; *subsequent proceedings* (1874), L.R. 9 Q.B. 531.
- (18) *Nutt v. Bourdieu* (1786), 1 Term Rep. 323; 29 Digest 223, 1804.
- (19) *Vallejo v. Wheeler* (1774), 1 Cowp. 143; 29 Digest 221, 1767.
- (20) *Samuel (P.) & Co. v. Dumas*, [1924] A.C. 431; 29 Digest 112, 666; 93 L.J.K.B. 415; 130 L.T. 771; *affg. sub nom. Samuel (P.) & Co. v. Dumas, Graham Joint Stock Shipping Co. v. Merchants Marine Insurance Co. (No. 2)*, [1923] 1 K.B. 592.
- (21) *Stamma v. Brown* (1742), 2 Stra. 1173; 29 Digest 222, 1785.
- (22) *Cory v. Burr* (1883), 8 App. Cas. 393; 29 Digest 217, 1736; 52 L.J.Q.B. 657; 49 L.T. 78.
- (23) *Earle v. Rowcroft* (1806), 8 East, 126; 29 Digest 221, 1769.
- (24) *Curtis v. Sheffield* (1882), 21 Ch.D. 1; 30 Digest 142, 180; 51 L.J.Ch. 535; 46 L.T. 177.

ACTIONS by cargo owners against underwriters claiming under three separate insurance policies insuring cargoes at sea in German-owned vessels at the outbreak of war. In two cases, the ships were scuttled by the master, and, in the other, the vessel successfully returned to Germany. In every case, the master from the outbreak of war obeyed the orders of the German government. The facts and arguments are fully set out in the judgment in each case.

Sir Robert Aske, K.C., and *Cyril Miller* for the plaintiffs.

H. U. Willink, K.C., and *A. J. Hodgson* for the defendants.

A HILBERY, J. : This is a claim upon a Lloyds marine and war risks policy of insurance in the standard form, whereby a part of a cargo in a German steamship, the *Minden*, was insured for a voyage from certain South American ports, including Buenos Aires, to Hong Kong and/or Shanghai, including transshipment at Durban. The policy was in the usual form, but expressed to include the conditions of the special clauses attached, which were the printed Institute War Clauses, and clauses for shipments from South America, and one typewritten clause, which reads as follows :

B Including damage by hook, oil, sweat, heat, freshwater and other cargo (liquid or solid), theft, pilferage and non-delivery, irrespective of percentage and/or short delivery, leakage, breakage from any cause in excess of 3 per cent. (ordinary loss), each package.

The policy was expressed to be warranted free of any claim based upon loss or frustration of the insured voyage or adventure caused by arrests, restraints or detentions of kings, princes or peoples.

C The agreed facts are stated by the parties as follows :

D The plaintiffs are the Forestal Land, Timber and Railways Co., Ltd., and they were at all material times the owners of the goods hereinafter referred to, which consisted of quebracho wood extract. (2) The said goods were to be transported from Buenos Aires for Hong Kong/Shanghai option including transshipment at Durban in the S.S. *Minden*. The *Minden* was a German-owned vessel. (3) The said goods were insured by the defendant and other underwriters on the voyage aforesaid against both war and marine perils by a policy annexed hereto marked "A." Both plaintiffs and defendant are British subjects. (4) The *Minden* sailed on or about Aug. 16, 1939, from Buenos Aires with Durban as her first port of call and with the insured goods on board shipped under bill of lading dated Aug. 16, 1939, and annexed hereto marked "B." On her normal voyage the *Minden* would have reached Durban about Sept. 15, 1939. (5) The subsequent movements of the *Minden* were as follows : Arrived Santos, Brazil, on Aug. 24, 1939. Sailed Santos on same day. Arrived at Rio on Aug. 25, 1939. Sailed Rio on Sept. 6, 1939. Off Faroe Islands N. Atlantic on Sept. 29, 1939. On and after Sept. 3 there was risk of capture whenever the *Minden* was outside the territorial waters of any neutral state. (6) On Sept. 29, 1939, the *Minden* in the presence of a British warship was scuttled by those on board her off the Faroe Islands and was lost with all her cargo including the goods aforesaid. (7) As from Sept. 3, 1939, there was an effective blockade of all German ports by the British and French naval forces who were further taking all possible steps to intercept capture or destroy all German merchant vessels on the high seas. (8) At all material times after Aug. 16 the German government, in furtherance of German war policy, had taken control of all German-owned merchant shipping and had given orders to all such vessels and their masters to take refuge in neutral ports and if possible to return to Germany with their cargoes or as a last resort to scuttle their vessels. (9) At no time was any notice of abandonment given by the plaintiffs to the defendant or other underwriters and no additional premium in respect of any deviation or change of voyage was ever tendered or paid.

G The parties further agreed that the court might draw inferences of fact.

H The plaintiffs claim that, during the currency of the policy, and while the goods were insured, they became a total loss by one or more of the perils insured against. This total loss is said to have been either actual or constructive—actual when the ship was scuttled on Sept. 29, or, alternatively, constructive when the ship was at Rio and war broke out, or, at latest, when she sailed from Rio. The loss of the cargo through the scuttling of the ship by the German master in the presence of a British warship, which it is to be inferred had stopped him when, in

accordance with his government's orders, he was trying to run the British blockade, may very well be a loss by warlike operations, a peril which, it is conceded, is covered by the policy, but it can give no cause of action on the policy unless, at the time when it happened, the cargo was still covered by the policy.

The difficulty about the claim for this actual loss which springs to the eye on the facts stated is that on no conceivable theory could the steamship be off the Faroes while on a voyage between Buenos Aires and Hong Kong via Durban, which was the voyage against the named perils of which the goods in question were insured. It is convenient, therefore, before I deal with the claim based on scuttling, which is the first claim made by the plaintiffs, to examine their second claim, which is for a constructive total loss in the circumstances set out in the particulars to para. 3 of the points of claim, which are as follows :

At some time, not more particularly known to the plaintiffs, after the said steamship had sailed from Buenos Aires on the said voyage, the captain of the said steamship, acting on the orders of the German government, proceeded to Santos with the intention of holding the said cargo for and to the order of the said government or of not delivering the same to or for the plaintiffs, and proceeded from Santos towards Germany via the Faroe Islands with the intention of returning with the said goods on board to Germany and there holding the said cargo for or to the order of the said government or of not delivering the same to or for the plaintiffs.

Everything in this case depends, in my view, upon the correct conclusion upon the issues which arise on the plaintiffs' claim for a constructive total loss. Both parties assume, and I am to assume, that the vessel set out on the intended voyage to Shanghai or Hong Kong, and that she left Buenos Aires on or about Aug. 16 on that voyage. Both parties also assume that, shortly after leaving, knowing that the German government had taken control of all German shipping and had given orders to German vessels and their masters, in case war broke out, to take refuge in neutral ports, and, if possible, to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels, the German master, having these orders in hand, decided to go via Santos to Rio, and there wait to see if war was declared. I draw the inference, and I do not think that the plaintiffs or the defendants dissent from it, that the master's intention was to stay at Rio for a time (the pre-war crisis being then at its height), and, if war did break out, then to make his decision either to stay there or to go back to Germany, running the British and French blockade if he could.

The argument for the plaintiffs has proceeded as though Rio were the port named in the particulars, and not Santos. It will be noticed that in the particulars the plaintiffs do not nominate any peril named in the policy as being the peril which caused the constructive total loss, but they state that certain things happened as a result of which they were deprived of the goods by one or more of the perils insured against. That is a course which is proper as a matter of pleading, for a reason which it is of importance to bear in mind in this case. It is the things which actually happen, and not the names by which they are called, which

cause the loss. Whether those things so happening come within the description in the policy of one, or more than one, of the perils covered is important in considering whether there is a consequent cause of action on the policy, but, even if those happenings can be said to fit several descriptions of perils given in the policy, they remain the same happenings and the one cause.

- A What, then, were the relevant happenings at Rio, and did they constitute a loss under the policy? Three days after war had actually broken out, the master weighed anchor and left Rio. That he then set out upon an attempt to get back to Germany there can be no doubt. How soon before he left he had decided to take this course it is not possible to infer, since we have no known facts from which to draw the inference. When he actually sailed for Germany, however, we have an overt act from which we can draw certain inferences. In thus acting, he was restraining or detaining the plaintiffs' goods. He was taking them and
- B holding them under and to the orders of the German government. The orders of the German government and his acts done thereunder were, in the circumstances, a restraint of princes or people. That they could be in law a restraint of princes is plain from the judgment of
- C BAILHACHE, J., in *Sanday & Co. v. British & Foreign Marine Insurance Co. (1)*, at p. 789 :

- In this case the restraint took the form of the common law, which upon the outbreak of war sprang automatically into force, and of the commands issued by proclamation. One of these was an injunction to shipowners "not to permit any British ship to leave for, enter, or communicate with any port or place of the German Empire." When once it is admitted that force is not necessary to constitute
- E restraint of princes it is clear that a shipowner who keeps his vessel at home or diverts her to a home port in obedience to such a proclamation is not taking steps to avoid that particular peril, but is submitting to its operation. In such a case restraint of princes is the proximate cause of loss.

- In the same case in the Court of Appeal, LORD READING, L.C.J., said, at
- F p. 800 :

- The words "arrests, restraints and detainments of all kings, princes and people" to my mind also imply some intervention of a fortuitous character, some interference out of the ordinary course of events by the governing authorities who have the force of the state behind them to compel submission to their authoritative decrees.
- G The acts of the master in thus restraining the plaintiffs' goods in the ship were done in obedience to the paramount orders of the government to which he owed allegiance. In doing the acts, he was not acting for himself or his owners. He was the agent of the German government. His act in obedience to the orders of the government of which he was
- H a subject was the act of that government. For the purpose of causation, no distinction can be drawn between the event which calls the subject's duty into existence and the subject's obedience to that duty. So high is the obligation that an act done in performance of it does not causally bear the character of a voluntary act or of a new intervening cause, as was said by LORD SUMNER in his opinion in *Becker, Gray & Co. v.*

London Assurance Corpn. (13), at p. 116. I do not use that word "agent" in the limited sense in which it is used in a civil action. I use it in connection with the question whether the master was acting as the hand of the German government in exercising this restraint.

The same question had to be considered by BAILHACHE, J., in *Atlantic Mutual Insurance Co. v. King* (2)—namely, whether, where an individual German did an act against German property in furtherance of the general German government policy, his act came within the word "hostilities" in the usual f.c. and s. clause. Having held that the word "hostilities" as used in the clause meant hostile acts by persons acting as the agents of sovereign powers, and did not cover the act of a mere private individual acting entirely on his own initiative, however hostile his action might be, BAILHACHE, J., said, at p. 313:

I do not, however, think that the word "agent" in this connection is limited to the strictness in which the words "agent" and "principal" are used in business transactions. I am disposed to think that a man is acting in such a case as this as the agent of his government when knowing that the settled and concerted policy of that government is to avail itself of the efforts of all its subjects, whether naval, military, or civilian, to destroy enemy life and property as occasion offers, he uses such opportunity as presents itself in furtherance of that policy.

Therefore, at the time when the master of the *Minden* sailed the vessel out of Rio, in my view there was a restraint of princes or people over the plaintiffs' goods. It was argued that this restraint could be said to begin when the master decided, in obedience to his government's orders, to take the goods and the ship back to Germany. As I have said, I have no ascertained fact from which I can infer when exactly the master made up his mind to return to Germany, prior to his weighing anchor with a view to leaving Rio, but, even if I had, restraint is a matter of fact, and not intention. It is an actual thing done, and not a mental resolution formed, which constitutes the restraint.

Since the master acted as he did after the outbreak of war when both he and his government were enemies of the British owners of the cargo, it may be said that, at the same time as there was a restraint, there was also a loss of the goods under the peril described in the policy as "enemies." That the facts which brought about the loss answer these two descriptions of peril in the policy makes no difference in essentials. There is often, it has been said, overlapping in the perils named in these policies. It does not mean that there was any more than one cause of the loss. The cause of the loss lay in the facts themselves, and not in the coincidence that those facts will fit more than one description of peril. Nevertheless, the causal facts may themselves be such that they show that the loss was brought about through more perils than one.

The defendants argue that the loss at Rio was brought about by loss of the adventure through the restraint of princes, a peril excepted from the policy by the "warranted free" clause. When, it is said, the master restrained or detained the goods by sailing with them for Germany on his government's orders, the voyage with the goods which was the

adventure the subject of the policy was finally abandoned, and the adventure the subject of the policy was frustrated, and that frustration was a loss of the goods, as decided in *Sanday & Co. v. British & Foreign Marine Insurance Co.* (1).

- Until the master sailed with the goods for Germany, there was no overt act done in relation to the goods which constituted a restraint of princes. If it is well said that this same act of restraint of princes frustrated the adventure and thereby caused a loss, the same act was resulting in the loss of the goods both through frustration of the adventure and through the peril described as "arrests, restraints of princes," and so on. It has been decided that, where there are shown to be two causes of the one loss, one of which is a peril insured against and the other of which is a peril of which the policy is warranted free, the assured cannot recover.

- In *Miller v. Law Accident Insurance Co.* (3), where the assured established that, on the facts which happened to a cargo of cattle the subject of a marine policy, a loss occurred at the port of destination through a restraint of princes or people, but, on the same facts, it could also be said that the loss was through "capture, seizure and detention," it was held that, as the policy was warranted free of capture, seizure and detention, the assured could not recover. It was argued before me that this difficulty did not arise, because this was a policy the subject-matter of which was goods, and that, if the plaintiffs showed a loss of their goods through a peril, it mattered not that the underwriters could show on the same facts a loss of the adventure causing a loss of the goods within the warranted free condition. I think that this argument is unsound, in view of what has been said by the courts to be the subject-matter of such a marine policy on cargo. The statements by the courts in the cases show that it is not true to say that a marine insurance policy in respect of cargo is an insurance of the goods alone, using that expression as justifying one in treating the goods as insured in some way which is separable from the insurance of the voyage upon which the goods are adventured. The policy being a marine insurance policy, the subject-matter of the insurance is of the adventure of the goods on the voyage. The goods are not insured apart from the voyage. It is the voyaging with the goods or the goods upon the voyage which is the subject-matter of the contract.

In *Sanday & Co. v. British & Foreign Marine Insurance Co.* (1), BAILHACHE, J., said, at p. 784 :

- ... in the case of a marine policy on goods the insurance is on the venture, and the loss of the venture constitutes a constructive total loss of the goods : see *Rodoconachi v. Elliott* (4).

In the Court of Appeal, in the same case, BRAY, J., said, at p. 832 :

It is not true that in a policy of this kind the goods only are insured. Their safe transportation to and arrival at the port of destination is also insured.

That the subject-matter in this policy is stated to be goods is common

form, and apparently was the form of the policy in *Rodoconachi v. Elliott* (4), yet it was held that it was an insurance of the venture. In *Sanday & Co. v. British & Foreign Marine Insurance Co.* (1), LORD READING, L.C.J., expresses it thus, at p. 811 :

But it is not only the goods that are the subject-matter of the insurance, but the goods on a voyage at and from ports in the River Plate to Hamburg. The insurance on the goods is a contract by the underwriters to indemnify the assured for any loss he may sustain by the goods not arriving in safety at their destination as an immediate consequence of a peril insured against.

The words of this well-known old form of policy are as follows :

Touching the adventures and perils which we, the assurers, are contented to bear and so do take upon us in this voyage.

These words seem to be not inept to convey the same conception.

In *Fooks v. Smith* (5), again BAILHACHE, J., said, at p. 512 :

It must be borne in mind that a policy on goods insures, or is intended to insure, their safe arrival at the port of destination mentioned in the policy. It is a policy of insurance on the adventure. If therefore the adventure is prevented by a risk named in the policy there is a claim on the underwriters.

The goods cannot, therefore, be separated from the voyage when one is dealing with the subject-matter of the insurance.

That frustration of the adventure causes a loss of the goods was decided in *British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co.* (1), affirming the Court of Appeal and BAILHACHE, J., in a judgment which was not merely affirmed throughout but expressly adopted in its entirety by LORD SHAW. BAILHACHE, J., said that at an early stage it was conceded that, in the case of a marine policy on goods, the insurance is on the venture, and the loss on the venture constitutes a constructive total loss of the goods. Later in his judgment, he said, at p. 789 :

In this case the restraint took the form of the common law, which upon the outbreak of war sprang automatically into force, and of the commands issued by proclamation. One of these was an injunction to shipowners "not to permit any British ship to leave for, enter, or communicate with any port or place of the German Empire." When once it is admitted that force is not necessary to constitute restraint of princes it is clear that a shipowner who keeps his vessel at home or diverts her to a home port in obedience to such a proclamation is not taking steps to avoid that particular peril, but is submitting to its operation. In such a case restraint of princes is the proximate cause of loss.

The same restraint, therefore, which the plaintiffs say caused a loss of the goods caused a loss of the goods through a loss of the adventure, and, in those circumstances, the plaintiffs do not show a loss through a peril insured without establishing that the loss was also due to a peril excepted by this "warranted free" clause, and the effect of *Miller's* case (3) is to decide that the plaintiffs then fail.

The plaintiffs sought to draw a distinction between the peril and loss by restraint of princes when the master sailed for Germany and the peril and the loss the subject of the "warranted free" condition. They contended that the form of the warranty here was a warranty against "a claim" based on the loss of the adventure through a restraint of

princes, and that their claim was not based on loss of the adventure. It must be borne in mind, however, that a warranty is added to a policy to free the underwriters from liability in the case of a loss through a particular peril or some class of peril, not against the form in which a claim may be made. "Based upon" is the same as founded upon, and
A the expression "founded upon" in connection with a claim signifies, to quote the words of BRAMWELL, B., in *Bryant v. Herbert* (6), at p. 390 :

Those facts which it is necessary to state and prove to maintain it, and no others.

Thus interpreted, the warranty means that, if those facts which it is
B necessary for the plaintiffs to state and prove to maintain their claim establish that the goods were lost through loss of the adventure caused by a restraint of princes, then the underwriters are free of liability. The facts here on which the plaintiffs rely as proving a restraint of
C princes causing a loss when the master sailed from Rio for Germany are facts which establish that there and then there was a loss caused by a loss of the adventure. The act which constituted the restraint of princes upon which the plaintiffs must base their claim for loss of the goods through restraint of princes is the departure with the goods from Rio for Germany. That same departure with the cargo on that
D voyage back to Germany was a frustration of the adventure. The plaintiffs do, therefore, base their claim on loss or frustration of the adventure, and, therefore, cannot, in my view; succeed in their claim for a constructive total loss at Rio.

It was argued for the defendants, alternatively, that, if there was
E a total loss at Rio through restraint, such a loss was constructive, and that the plaintiffs had not established, as they must under the Marine Insurance Act, 1906, s. 60 (2) (i), that, at the time of the alleged loss, it was unlikely that they could recover the goods. That section, it was decided in *Polurrian S.S. Co., Ltd. v. Young* (7), at p. 937, puts
F on the plaintiffs the burden of establishing fully, not merely that it was quite uncertain whether or not they would recover the goods within a reasonable time, but that the balance of probability was that they could not do so. I do not know how one is to balance the probabilities in the matter. There were many possibilities, but I know of no principle
G by which one can determine why, in the circumstances, one possibility was more probable than another. The ship might have been intercepted by the British or French naval forces. One would like to think that it was more probable that she would be caught than that she would not, but one lacks the data on which to form any judgment. If I assume
H that she was more likely than not to be intercepted in her attempt to run the blockade, such facts as I do know suggest to me that it was more probable that the plaintiffs would lose the goods through the master scuttling the ship than that the master would submit to capture. If the ship got back to Germany, it is possible, of course, that the German government might have released her cargo on special terms arranged

through neutrals, and might not have confiscated it, but, if I am entitled to guess, I should say that it was more probable that the goods would not be released than that they would. If, therefore, there was a constructive loss at Rio by a risk insured against and not warranted free under the policy, as the notice of abandonment is not insisted upon, and as the point that there was no such notice is waived, I think that it was more unlikely than not that the owners would recover the goods, and I should hold that the other requirements of the section to enable the plaintiffs to establish a constructive total loss had been satisfied. A

I turn, then, to the other claim made by the plaintiffs—that is, for the actual total loss of the goods when the ship was scuttled. The policy included the Institute War Clauses, cl. 1 (b), which expressly provides as follows : B

. . . the policy covers loss or damage to the property hereby insured caused by :
(1) hostilities warlike operations civil war revolution rebellion insurrection or civil strife arising therefrom. . . . C

In *Britain S.S. Co. v. R.* (8), more often referred to as the “Petersham” and the “Matiana” case, the expression “hostilities and warlike operations” was considered and authoritatively interpreted. VISCOUNT CAVE said, at p. 108 : D

The word “hostilities” connotes operations of war, which may be either offensive or defensive and may be undertaken either by the vessel immediately concerned or by an enemy or friendly force. The expression “warlike operations” is said to have been added in order to cover cases where similar acts were done but no actual outbreak of war had occurred. But however that may be, the effect of the addition is somewhat to extend the category of acts referred to, even where a war is in progress ; and the appellants throughout their argument relied upon the expression “warlike operations” as the wider of the two expressions. But, in order that the words may apply, there must be some act of war or of a warlike character which could have caused the loss sued upon. E

In the light of that exposition, I cannot doubt that a merchant vessel belonging to one of two belligerents is engaged in a warlike operation when the master of that vessel, acting upon the orders of his government, tries to run the blockade, and, by eluding the armed forces of his enemy, to reach his beleaguered and belligerent country. When he thus attempts to run the blockade under an order to sink his ship and cargo if he is intercepted, and when, in the event, he is intercepted by an enemy warship and does sink his ship and cargo, I cannot doubt but that the loss of the cargo which then occurs is proximately caused by the warlike operation. Both vessels present at the time of the scuttling are, in the plain and ordinary meaning of the language, engaged in a warlike operation. Additionally, there is authority for holding that, at the time of the scuttling, there was a capture by the British warship. F G H

In *Butler v. Wildman* (9), where, in order to prevent a quantity of dollars from falling into the hands of an enemy by whom he was about to be attacked, the captain of a Spanish ship threw them into the sea and was immediately afterwards captured, it was argued that the loss was not caused by a peril insured against, but was an act done by the

captain under the influence of fear and in avoiding a peril insured against. It has been held in a line of cases of well-recognised authority that, if such were the true view, the loss was not caused by the peril: *Hadkinson v. Robinson* (10), *Lubbock v. Rowcroft* (11) and *Kacianoff v. China Traders Insurance Co., Ltd.* (12). The court held, however, that

A it was a loss within the peril described as "enemies," for ABBOTT, C.J., treated the ship as having been captured at the time when the dollars were thrown overboard. BAILEY, J., said that the ship was in point of fact taken, and HOLROYD, J., said that it was a loss by enemies, for the meditated attack was the direct cause of the loss.

B While it is true that LORD SUMNER in his dissenting opinion in *Becker, Gray & Co. v. London Assurance Corp'n.* (13), says, at p. 116, that, if any of the cases on causation of loss is illogical, it is *Butler v. Wildman* (9), for there the dollars went to the bottom, and that by the prompt decision of the master, yet he adds these words in the next sentence, at p. 116 :

C The adventure of which they formed part was captured, and so they may be said to have been lost to their owners by capture though the Spanish captors never got them. The immediate and actual control, which the captors possessed by armed force over the whole adventure, was equally a capture of the part, and perhaps it is the best way of putting it to say that the captors captured the whole adventure but the captain balked their profiting by a part of it . . .

D Therefore, while I think it plain that the scuttling was proximately caused by a peril named in the policy, that loss is not one for which the underwriters can be held liable unless it occurred during a voyage covered by the policy in respect of the named perils for which the underwriters undertook responsibility. It is not contended, of course, that,

E when the ship was scuttled off the Faroe Islands, she was on a voyage to Hong Kong or Shanghai from South America. What is said is that the policy included Institute War Clauses, cl. 6 (known as the "held covered" clause), and that by that clause the underwriters agreed to hold the plaintiffs covered (subject as stated therein) at a premium

F to be arranged in case of deviation or change of voyage, or other variation of the adventure by reason of the exercise of any liberty granted to the shipowner or charterer under the contract of affreightment, or of any omission or error in the description of the interest, vessel or voyage.

G It is conceded that, in the circumstances, there cannot be said to have been a variation of the adventure by the exercise of a liberty granted under the bill of lading, since it is admitted that, on the outbreak of war, that contract became an illegality, and could give no rights to either party. It was contended, however, that, when the master set out from Rio to return to Germany, there was a change of voyage. On

H behalf of the plaintiffs, it was said that what the master did satisfied the definition of change of voyage under the Marine Insurance Act, 1906, s. 45, and came within the terms of the "held covered" clause already quoted. In my view, the "held covered" clause in such a contract as this cannot be construed as covering such an adventure as this master undertook when he weighed anchor at Rio and set out for

Germany. According to the Marine Insurance Act, 1906, s. 45, a "change of voyage" occurs :

Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy. . . .

What is contemplated by the clause, using, as it does, the same expression as is thus defined in the statute, is the case of a voluntary A
change of destination from that originally contemplated by the policy. The language is designed and apt to enable the parties by an act of free will to alter the destination of what remains in all other essentials the same adventure. Language which in terms empowers the parties to a contract for the carriage of goods by sea by their free wills to change the B
destination of the commercial voyage with the goods cannot, without doing violence to it, be construed as binding the underwriter to keep the goods insured when, unknown to the cargo owner, they are involuntarily taken by the shipowners, under the orders of the government to which the shipowners belong, on a warlike adventure in which that C
government is alone interested, and in which neither the cargo owners nor the shipowners can have any common interest whatsoever. The changed voyage contemplated by the clause must, it appears to me, be a voyage at least belonging to the same genus as that about which the parties are contracting. The parties to this contract are contracting D
about a carriage of goods between certain ports in the ordinary way of peaceful commerce, and the perils of such an adventure. The parties are not contracting in this clause about some voyage the result of a metamorphosis of the whole subject-matter of the contract.

A good example of the kind of event which is intended to come within E
the ambit of this clause was given in the argument. If, for instance, it was said, goods are on an insured voyage to Bombay, and a voluntary change of destination from Bombay to Karachi is decided upon because of unusual congestion at Bombay, or for some other good reason, then the goods are held covered under this clause. That which is then toward F
is still an adventure with the goods common to the parties, and in substance is of the same type, but for the change of destination, as that about which the underwriters have been willing at all times to contract.

When the German master of this vessel set out from Rio, he did not set out on a commercial voyage. Acting as the agent, and under the G
orders, of the German government, he embarked upon a warlike operation with the ship and cargo against the enemies of his country. It was not a change of destination decided upon by the master in his capacity of a ship's master acting for his shipowners. He did not decide. He submitted to the orders and control of the German government. He H
did not supply a peaceful common adventure with a new destination. He substituted for a common adventure with a destination a warlike operation with a military objective. In my view, therefore, the underwriters of this policy were not upon the risk at the time when this ship was scuttled. The actual total loss or capture during warlike operations

and scuttling did not occur while the policy was in operation, for the adventure had been frustrated and the voyage insured wholly abandoned at Rio, nor did it occur during any voyage in respect of which the underwriters had bound themselves. The claim, therefore, for the actual loss by scuttling also fails.

A It remains for me to deal with certain other alternative contentions put forward by the plaintiffs. It was argued that, at the time of the scuttling, or at Rio, there was a "taking at sea," a risk against which this policy expressly insures.

B I have already said enough in considering and concluding that, when the ship was scuttled, she was lost through a warlike operation, and in dealing with *Butler v. Wildman* (9), to show that there is justification for saying here that there was a capture of this ship immediately before she was scuttled. Capture is a taking by the enemy as prize in time of open war with intent to deprive the owners of their property in the goods. It is a belligerent act. A taking at sea is something less, for it may be a taking at sea though at the time there is no intention thereby to deprive the owner of his property in the ship, but merely an intention to take the ship in for adjudication. It is the less thing included in the greater which is capture. If I am right in thinking C that here there was capture, then there was also a taking at sea immediately before the ship was scuttled. However, the question is quite different when considered in relation to what happened at Rio. When the master weighed anchor and sailed for Germany on the orders of the German government, and acting for them, was there then a taking at sea? The defendants say that there was not, because the taking occurred when the master weighed anchor and set out for Germany, and he did this when he was in Rio, and not when he was at sea. The plaintiffs argue that the expression "taking at sea" should be construed to cover takings in harbour as well as takings when at sea, just as the words "perils of the sea" have been construed as including the heeling F over of a ship when at anchor in an open roadstead for loading: *The Stranna* (14). However, the expression "perils of the sea" is used to describe those perils to which every maritime adventure is subject. They are perils which have a marine character: *per* LANGTON, J., in G *The Stranna* (14) ([1937] P. 141, [1937] 2 All E.R. 386.) It has frequently been said that to speak of perils of the sea is to speak of something different from perils on the sea or perils at sea: *per* LORD HERSCHELL in *Wilson, Sons & Co. v. Xantho* (*Cargo Owners*), *The Xantho* (15), at p. 509; see also SCRUTTON ON CHARTERPARTIES, 14th Edn., p. 269, n. H The one expression denotes a quality of the peril while the other denotes a place where the peril occurs. Thus, here the expression "takings at sea," if the language is given its ordinary meaning, denotes the place where the taking happens. No sailor would speak of himself or his vessel as being at sea when his vessel was in harbour. Normally one uses the expression "at sea" in contradistinction to being in harbour.

In the absence of any authority to the contrary, for I can find none and none was cited, I see no reason why the language should be given any other than its ordinary meaning. That is to say, the expression "takings at sea" means a taking when the vessel is at sea, and not when she is in harbour. When the master weighed anchor and set off with this ship and cargo, taking the goods on behalf of his government, he was not at sea. He was in harbour, and the taking did, therefore, fall within this peril. A

Another alternative contention of the plaintiffs was that, in the circumstances, there was a non-delivery of the cargo, and that non-delivery was a peril insured against. In truth, the policy does include a type-written slip in the terms I have already quoted—namely : B

Including damage by hook, oil, theft, pilferage and non-delivery . . .

Nevertheless, these general words ("non-delivery" following enumerated perils insured against) cannot be divorced from what has gone before and treated as intended to denominate an entirely new risk. They are limited by the context in which they are found. Such words in such a context are to be construed, not as creating a new or further risk, but as affecting the burden of proof. Where such words occur in such a context, the insured need not prove loss by theft or pilferage. It is enough if he proves non-delivery and gives *prima facie* proof that the goods were not lost in any way other than by theft or pilferage. Unless the underwriters can then prove that the loss was due to a peril against which they have not insured, they are bound to pay the claim. Thus, in *Zachariessen v. Importers & Exporters Marine Insurance Co.* (16), on a policy insuring against "mine risks only, including missing," it was not enough for the insured merely to prove that the sailing vessel in question was missing, but it was enough that he proved *prima facie* that during the voyage the vessel had not experienced any marine peril which would be likely to overwhelm her, and could have struck a mine. F
However, the case I am deciding is not one of mere non-arrival plus evidence sufficient to establish *prima facie* that it could have been a matter of theft or pilferage, and that the loss is not otherwise reasonably to be accounted for. It is not a case which, on its facts, has anything to do with non-delivery, when that term is applied in the context in which it occurs. The word "non-delivery," therefore, does not assist the plaintiff. G

Yet a further peril insured against, which was said by the plaintiffs in the alternative to be the cause of the loss of the goods and to entitle them to be paid by the underwriters, was barratry of the master and crew. Once again an effort was made to include in the risk called barratry a breach of duty by the master towards the cargo owners done in bad faith towards them. Whether the goods were constructively lost through arrest or restraint of princes or actually lost through the scuttling of the vessel by the master in the presence of a British warship, H

the acts of the master were done in submission to the German government orders, and in fulfilment of his duty to that government, to which he owed allegiance. There was no fraud on his part practised upon anyone.

A In support of the argument that barratry might not only be a damage or hurt done to the goods by the master in breach of his duty to the owners of the ship and in bad faith towards them, but might also be an act done in breach of duty and in bad faith towards the owners of the cargo, reliance was placed on *Ionides v. Pender* (17) as authority for this, because in that case HANNEN, J., in summing up to the jury, told them B that the scuttling of the ship by the master, if he had done it out of his own head or at the instigation of the shipowner, but without the knowledge of the cargo owner, would be barratry, a loss caused by the misconduct of the crew or the captain.

C Before any reliance is placed upon this *dictum*, there are certain very significant things to be observed in connection with it. The first is that, immediately he had given the direction to the jury, objection was taken to it by counsel for the underwriters. Barratry, said counsel for the underwriters, must be a crime against the employer, the owner of the ship. The second is that the reporter appended a note as follows, D at p. 247 :

This is a resuscitation of the question whether, notwithstanding the fact of barratry being committed with the knowledge and consent of the shipowner, the freighter may recover against the underwriters. We certainly thought it firmly settled that there cannot be barratry except as against the owner of the ship, and a charterer cannot recover unless he is owner *pro hac vice*. In *Nutt v. Bourdieu* (18), E LORD MANSFIELD said [p. 330] : " The point to be considered is, whether barratry . . . can be committed against any but the owners of the ship ? It is clear, beyond contradiction, that it cannot."

The reporter then adds the reasons given by LORD MANSFIELD, and quotes PHILLIPS ON INSURANCE and *Vallejo v. Wheeler* (19), where the person who recovered was, it is true, not the owner, but was the charterer, F and was found by the jury to be owner *pro hac vice*. The third observation to be made is that there is no other reported case in our law where barratry has been held or said to extend to an act beyond a breach of the master's duty to his owners done in bad faith. I have already said that, in my view, the master, in scuttling the ship, was G acting on the orders of the German government, who had apparently taken the control of the vessel out of the hands of the owners. If so, the act was not done in bad faith towards the owners, nor can it be said, I think, to have been an act, as it is sometimes said, of knavery or breach of duty towards his owners.

H In taking control of German shipping, the German government either put themselves in the place of the owners for the time being or assumed all the powers in connection with the ships which the owners would otherwise have had, and, when the master, acting for them and on their orders, scuttled the ship, it must have been in the exercise of a power either paramount to, or exercised in place of, that of the owner, or

exercised as that of the owner for the time being. Unless, therefore, the *dictum* of HANNEN, J., can be shown to be right, the loss here was not through barratry. HANNEN, J., however, was not deciding the point. He was directing a jury *at nisi prius*, and there is overwhelming authority to show that his direction was wrong.

Nutt v. Bourdieu (18) is a direct decision the other way. The headnote A to that case is as follows :

Barratry can only be committed against the owner of the ship and without his consent.

In delivering the judgment of the court, LORD MANSFIELD, C.J., said, at p. 330 :

The point to be considered is, whether barratry, in the sense in which it is used in our policies of insurance, can be committed against any but the owners of the ship ? It is clear beyond contradiction that it cannot. For barratry is something contrary to the duty of the master and mariners, the very terms of which imply that it must be in the relation in which they stand to the owners of the ship. The words used are master and mariners, which are very particular. An owner cannot commit barratry. He may make himself liable by his fraudulent conduct to the owner of the goods, but not as for barratry. And, besides, barratry cannot be committed against the owner with his consent ; for though the owner may become liable for a civil loss by the misbehaviour of the captain, if he consents, yet that is not barratry. Barratry must partake of something criminal, and must be committed against the owner by the master or mariners. In the case of *Vallejo v. Wheeler* (19), the court took it for granted that barratry could only be committed against the owner of the ship. The point is too clear to require any further discussion.

Not only has that decision stood without criticism since, but LORD SUMNER, in his dissenting judgment in *Samuel (P.) & Co. v. Dumas* (20), which, upon this particular topic, and from this point of view, is not affected by the fact that it is a dissenting judgment, said, at p. 463 :

Thus there is very old authority for saying that cargo owners cannot recover as for barratry, when the barratrous act leading to the loss was assented to by the shipowner, for it is of the essence of barratry that the shipowner is wronged, and he is not wronged when he consents : *Stamma v. Brown* (21) ; *Nutt v. Bourdieu* (18).

In 1883, eleven years after this reported *dictum* of HANNEN, J., LORD BLACKBURN said, in *Cory v. Burr* (22), at p. 399 :

The definition of barratry in the case of *Earle v. Rowcroft* (23) has never been departed from.

The definition which LORD BLACKBURN was approving was that of LORD ELLENBOROUGH, C.J., when he said in *Earle v. Rowcroft* (23), at p. 134 :

[Barratry] is considered as being precisely tantamount to fraud, in the particular relation which subsists between master, mariners, and owners ; being such by which a loss may happen to the subject-matter insured.

The argument on this head is, therefore, in my view, not merely without legal foundation, but also contrary to the highest authority.

One other point with which I have been asked to deal, and which was raised in the course of the argument, arises upon the Institute War Clauses, cl. 1. It is the result of the contractually unfortunate, though practically convenient, method habitually employed of using the standard

and sacrosanct form of Lloyd's marine policy and adding to it printed sets of clauses expressed to be included in the policy as special clauses, without, apparently, much regard for the particular context in which they will then occur, or their incompatibilities with one another or with the standard forms of expression already in the policy. This

A policy was expressed to include, amongst other sets of clauses, the Institute War Clauses. Clause 1 provides as follows :

This policy covers (a) the risks excluded from the standard form of English marine policy by the clause : Warranted free of capture seizure arrest restraint or detainment, and the consequences thereof or of any attempt thereat ; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not, civil war, revolution, rebellion, insurrection or civil strife arising therefrom, or piracy. (b) loss or damage to the property hereby insured caused by : (1) hostilities, warlike operations, civil war, revolution, rebellion, insurrection or civil strife arising therefrom. (2) Mines, torpedoes, bombs or other engines of war.

The plaintiffs urge that, as a matter of construction, cl. 1 (a) must be read as additional to the risks already enumerated in the policy. On the other hand, it was argued for the defendants that cl. 1 (a) had really no application to this particular case, and made no difference to this particular policy, for the reason that the risks enumerated were not risks of which the policy had ever been warranted free.

I think on examination that this argument of the defendants is right. These Institute War Clauses are in form intended to be a standard set of war clauses for use in conjunction with the standard form of English marine policy containing its standard warranty of freedom clause known as the f. c. and s. clause. Clause 1 (a), when used with a policy in such a form, then puts back into the policy that which the f. c. and s. clause has taken out of it. In form, the clause is one which purports to put back risks excluded. Here this piece of machinery for restoring something excluded has been added to a policy in which those perils ordinarily excluded are to be found included, and the machinery provided by cl. 1 (a) has not, therefore, the material to work upon for which it was devised. I do not think, therefore, that cl. 1 (a) of the Institute War Clauses is to be construed as adding to the perils insured by the policy in this case.

Upon the conclusion at which I have arrived with regard to the " held covered " clauses, the counterclaim, which is only made in the alternative, does not arise. I am conscious that I have discussed and given my conclusions upon several matters not necessary to my decision. I have reluctantly encumbered this judgment with my opinion upon these points because both parties asked me to do so.

Judgment for the defendants.

MIDDOWS, LIMITED v. ROBERT SPENCER ROBERTSON.

HILBERY, J. : This is also a claim upon a Lloyd's marine and war risks policy of insurance in the standard form, whereby the underwriters insured goods and merchandise as thereafter might be declared. In

addition to the standard risks, the policy in a typewritten clause was expressed to be against all and every risk of loss and/or damage from any cause whatsoever, including all war, riot, strikes, civil commotions and malicious damage. The policy was also expressed to be subject to the Institute War Clauses, dated Feb. 1, 1938. The Institute Strike Clauses, dated Apr. 26, 1937, and these printed clauses, together with A printed sets of Institute Cargo Clauses W.A. and F.P.A. included in its terms, were attached to the policy. The policy was warranted free in the same terms as in the case of the Minden. The cargo in question was duly declared and shipped in a German vessel, the Wangoni. The bill of lading included in its terms a special war clause (r. 10), a trans- B
 .lation of which is, with the documents, agreed between the parties.

The parties have stated and agreed the facts in the following terms :

(1) The plaintiffs are Middows, Ltd., and they were at all material times the owners of the goods hereinafter referred to, which consisted of Bristolite white triplex boards. (2) The said goods were to be transported from Bremen, Germany, to Cape Town in the S.S. Wangoni. The Wangoni is a German-owned vessel. C
 (3) The said goods were insured by the defendant and other underwriters on the voyage aforesaid against both war and marine perils by a policy annexed hereto and marked "A." Both plaintiffs and defendant are British subjects. (4) The Wangoni sailed from Bremen with the insured goods on board shipped under bill of lading dated Aug. 12, 1939. Cape Town was her first port of call, and on a normal voyage the Wangoni would have reached Cape Town on or about Sept. 12, 1939. (5) The subsequent movements of the Wangoni are as follows : Arrived at Las D
 Palmas on Aug. 29, 1939. Sailed thence for Vigo, Spain, on the same day. Arrived at Vigo on Sept. 1, 1939. Remained at Vigo until Feb. 10, 1940. Arrived at Hamburg on Mar. 5, 1940. On and after Sept. 3 there was a risk of capture whenever the Wangoni was outside territorial waters. (6) As from Sept. 3, 1939, there was an effective blockade of all German ports by the British and French naval forces who were further taking all possible steps to intercept, capture or destroy all German merchant vessels on the high seas. (7) At all material times the German govern- E
 ment in furtherance of German war policy had taken control of all German-owned merchant shipping and had given orders to all such vessels and their masters to take refuge in neutral ports and if possible to return to Germany with their cargoes. (8) Copy of certain correspondence relating to the goods aforesaid is annexed hereto and marked "C." A translation of the German Commercial Code, para. 635, referred to in the correspondence is annexed hereto and marked "D."

The material letters are there. On Oct. 9, 1939, Muller & Co. (London), F
 Ltd., wrote to Messrs. Middows, Ltd., as follows :

s.s. Wangoni, s.s. Wahehe. We beg to submit copy of letter received from the Rotterdam agents of the German African Lines *re* the above steamers. If you wish to take delivery of goods at Vigo doubtless you will communicate with Messrs. F. A. Voigt & Co., P.O. Box 1158, Rotterdam.

The letter referred to, dated Oct. 4, is from Voigt & Co., and is G
 in these terms :

s.s. Wangoni 15-8-39, s.s. Wahehe 18-8-39. In consequence of the international situation this steamer has called at Vigo as port of distress. According to the B/L conditions it is intended to place the goods shipped by this steamer at the disposal of shippers/consignees, as far as it will be possible to deliver them. Delivery could be made under the following conditions. (1) Payment of full freight (so far not yet paid) and discharging expenses. (2) against surrender of the full set of original H
 Bs/L duly indorsed and receipted. (3) additional payment of 25 per cent. of the value of the goods for calling at a port of distress according to the German Commercial Code, para. 635. Deposit—of an irrevocable bankers' guarantee for 100 per cent. of the value of the goods. Forms of this guarantee are at the disposal of the party interested. As far as these conditions have been fulfilled, we shall be asking the company to wire at the expense of the party interested to the agency at Vigo, Messrs. Soc. An. Deposito de Carbones, Luis Tabcada 5, to arrange delivery. We must

however draw attention to the fact that delivery can only be made so far as discharge and delivery is possible with regard to the stowage and eventual other difficulties. Please inform us by return whether shippers/consignees or any other party concerned wish to receive the goods at Vigo, giving us names of the firms wishing to take delivery of their goods at that port.

P.S. All charges for restowage to be for account of the goods for which restowing is necessary.

A Thereupon, on Oct. 11, 1939, Middows, Ltd., wrote to Stewart Smith & Co. as follows :

We enclose copy of letter from the Rotterdam agent of the German African Lines. We had one shipment per s.s. Wangoni Bremen to Cape Town, Certificate No. C5517510, and should be glad to know the procedure in a case like this.

B Then I can pass to Feb. 14, 1940, when Middows, Ltd., again wrote to Stewart Smith & Co. as follows :

C s.s. Wangoni. We shipped a small parcel of goods on this vessel in August last and enclose herewith B L and relative insurance certificate—goods were covered for £24. We learn that this vessel left Vigo on the 10th inst. clearance being given for the home port which, of course, in this case means Hamburg. Therefore, we maintain this constitutes a total loss under the war clause and should be glad if you would let us have settlement of same at your convenience.

On Feb. 17, Stewart Smith & Co. replied to Middows, Ltd., as follows :

D s.s. Wangoni. We are in receipt of your letter of the 14th inst. advising us that a parcel of goods has been discharged at Hamburg and you wish to claim for a total loss per the above vessel. We have shown this letter to underwriters who advise us that all German claims are being considered by a special committee and it may be a little while before we have any information. We have left full particulars of the loss with this committee and will keep in touch with them and advise you further in due course.

E On Mar. 6, Middows, Ltd., wrote again to Stewart Smith & Co. as follows :

F s.s. Wangoni—yours Feb. 17. We have now been advised by Cox & Kings (Agents), Ltd., of King William Street House, that the s.s. Wangoni has actually reached Germany and, therefore, should be considered a total loss. Cox & Kings advise us that the London Chamber of Commerce have a special department dealing with such cases as this and are passing on to them details of our interest which we furnished some little time ago.

On Mar. 27, there is a letter from the secretary of the London Chamber of Commerce to Middows, Ltd., in the following terms :

G British cargoes in enemy vessels in German ports. s.s. Wangoni. Referring to previous correspondence with regard to your cargo aboard the s.s. Wangoni, the chamber has been informed that this vessel arrived at Hamburg from Vigo on the 1st inst. and the work of unloading, which is proceeding at Shed No. 28, Petersen Quay, is expected to be completed by the end of the month. The cargo had not been seized by the German government up to the 21st inst. and there is apparently no intention of doing so in the near future, but certain goods which are unsuitable for further warehousing, or in respect of which a heavy increase of warehouse charges is likely to accrue, will be sold. It is understood that the German African Lines are prepared to release the goods in accordance with the conditions of the bills of lading, and the stipulations of the German government, subject to the following conditions :—1. payment of full freight (if not paid in advance). 2. presentations of the full set of original Bs/L duly indorsed (if the full set of Bs/L cannot be produced the delivery may be effected against a bank guarantee; this will be decided in each case separately). 3. payment of a contribution to the expenses of the port of refuge of 13 per cent. of the c.i.f. value. This contribution is to be considered as an entire settlement of the participation of the cargo in the expenses of the port of refuge according to the Commercial Code, para. 635. Quay dues and warehouse rents accruing after discharge will be for the account of the goods.

It is necessary to point out that should you decide to endeavour to secure release of your cargo through a neutral intermediary it is essential for you first to obtain permission to do so from the Trading with the Enemy Branch of the Board of Trade, Alexandra House, Kingsway, W.C.2.

On Mar. 28, Middows, Ltd., replied to that letter as follows :

We thank you for yours of the 27th inst. *re* British cargo in German ports s.s. Wangoni. Will you please say if anyone is acting for the chamber, or for other concerns who have cargo on the same vessel. It seems to us it would be better for one party to handle the lot. We have the full set of documents in London. Fortunately our claim is only small, the c.i.f. value being £22 9s. A

On Apr. 5, the secretary to the London Chamber of Commerce replied to Middows, Ltd., as follows :

I duly received your letter of Mar. 28, and in reply have to inform you that each application for the release, through a neutral intermediary of cargo aboard a German vessel which has returned to Germany is considered by the Trading with the Enemy Branch of the Board of Trade upon its merits and it is therefore necessary for individual application to be submitted. In some cases, of course, cargo owners may consider the conditions upon which release of goods can be effected prohibitive, but on the other hand another firm may be quite prepared to comply with them. If you have no connections in a neutral country I suggest your best course would be to communicate with Messrs. Wm. H. Muller & Co. N.V. P.O.B. 770, Rotterdam when the necessary permission of the Trading with the Enemy Branch has been obtained. C

On Apr. 8, Middows, Ltd., wrote to the Trading with the Enemy Branch of the Treasury and Board of Trade as follows :

s.s. Wangoni. This vessel, as you know, recently left Vigo and returned to Hamburg and on which we have 6 bales of paper boards destined for Cape Town. We understand from the London Chamber of Commerce that if we have your authority we may possibly be able to obtain delivery of these goods through a neutral country and we think that the firm of W. H. Muller & Co. of Rotterdam would act for us in this matter. Would you please let us know the conditions under which these goods may be released. D

The statement of facts continues as follows :

(9) The plaintiffs never paid the sums demanded at Vigo or Hamburg and did not take delivery of their goods upon the terms offered at either port. (10) At no time was any notice of abandonment given by the plaintiffs to the defendant or other underwriters and no additional premium in respect of any deviation or change of voyage was ever tendered or paid . . . E

Then it was agreed that the court might draw inferences of fact.

Certain inferences can, I think, be reasonably drawn from the stated facts. In the first place, it seems reasonably certain that the German master in this case had the orders of his government before Aug. 29. That those orders were in the hands of some German masters of German vessels before Aug. 24 we know from the facts of the case of the *Minden*. There is no known reason for the call at Las Palmas, unless that was a deviation made because of those orders. That call on Sept. 29 is a material time and circumstance in this case, and it is agreed by the statement of facts herein that at all material times the German government had taken control of German-owned vessels and given orders to them and their masters to take refuge in neutral ports, and, if possible, to return to Germany with their cargoes. It is reasonable, I think, to infer, therefore, that the master deviated to Las Palmas and went thence H

to Vigo acting under those orders, and intending, if war broke out, to wait at Vigo, and thereafter to decide what course to pursue.

Until war broke out, it is difficult to say with any degree of certainty that the master had decided finally to abandon the voyage the subject-matter of the policy. On the outbreak of war, however, having regard
A to his orders from the German government, I think that there can be little doubt but that he gave up and abandoned the voyage to Cape Town altogether and determined to act entirely under the German government orders as the agent of that government and solely in its interests. It was conceded by the plaintiffs' counsel that on this view
B the German Commercial Code was of no force or effect in the matter. It was contended on behalf of the plaintiffs, first, that there was a constructive total loss at Vigo when the master determined to act on the orders of the German government to take the goods to Hamburg, or, alternatively, when he left Vigo with that intention, and thereby
C manifested his determination. Secondly, it was contended in the alternative that there was a constructive total loss when the ship reached Germany, and, thirdly, it was contended that, if it was wrong to say that there was a constructive total loss when the ship reached Germany because it appeared from the correspondence that the plaintiffs might
D on certain terms have recovered their goods, then there was a partial loss. As to the first contention, on the facts and correspondence, I do not think that it is possible to say with certainty when, prior to the date of his departure, the master determined to take the goods back to Hamburg. The fact that an offer was made through a neutral to release
E their goods to the cargo owners on terms is incompatible with any final determination to hold the goods and carry them back to Germany. The correspondence does not contain any indication that the offer was withdrawn. As long as it was open, there can have been no such final determination.

F The first date when it becomes certain that the final determination to take the goods back to Germany was made was Feb. 10, 1940, when the vessel sailed for Germany. The fact, however, that at Vigo the cargo was recoverable only on the special terms upon which it was offered back is, I think, evidence of a restraint of the goods at that
G time, but it is impossible for the plaintiffs to say that it amounted to a constructive total loss, since they cannot show, in face of the offer of the goods on terms, that, while the ship was at Vigo, it was impossible for them to obtain their goods, or that it was unlikely that they could recover the goods. They cannot discharge the burden upon them
H of establishing fully, not only that they were deprived of the possession of their goods, but also that the balance of probability was that they could not recover possession of them within a reasonable time. It is true that the offer of the goods was expressed to be only if discharge and delivery were possible having regard to stowage and eventual other difficulties, and it was uncertain, therefore, whether or not, even if they

satisfied the terms demanded, they would recover their goods within a reasonable time, but that is not sufficient. Those considerations do not show that it was more unlikely than not that they could have recovered them. In respect of the alternative claim that there was a constructive total loss when the master left Vigo with the goods to return to Germany, the plaintiffs are again, in the particular circumstances, in the same difficulty. The vessel and the master had been acting under the German government orders. The offer to restore the goods to the plaintiffs on terms can have been made only with the German government's approval. One would think that that offer would scarcely have been made if the German government wanted this cargo sufficiently to have determined, if possible, to get it back to Germany for confiscation. If, therefore, the vessel succeeded in getting back to Germany, it was not unlikely that there might even then have been an offer of a return of the goods on terms, as, indeed, there was on Mar. 27, 1940. Furthermore, while she was on the voyage back to Germany, every day and at all times there was the chance that the ship might be captured by British or French naval forces and the cargo belonging to English owners restored to them. In such circumstances, the plaintiffs have not satisfied me that, even when the ship sailed from Vigo, it was more unlikely than not that they could recover their goods within a reasonable time. If I am wrong in this view, and if it was more unlikely than not that the plaintiffs would recover their goods, then I am of opinion that, when the master sailed from Vigo, for the reasons I have given in the case of the *Minden*, there was a constructive total loss through a restraint of princes. However, as I decided in the case of the *Minden*, that loss so caused was also, at the same time and on the same facts, brought about by a frustration of the adventure caused by the restraint of princes, and, as the latter of the two causes producing that loss is the risk of which the policy is warranted free, the plaintiffs cannot divorce the former from it and recover under the policy. I need not again give my reasons for this view. I have set them out in the case of the *Minden*, but I base that view, as I said before, on the decision in *Miller v. Law Accident Insurance Co.* (3).

For the reasons which I gave in the case of the *Minden*, the adventure the subject-matter of the insurance being frustrated when the master sailed from Vigo, the subject-matter of the policy was gone, and the underwriters were no longer at risk with regard to the cargo on the voyage back to Hamburg, or after it was unloaded at Hamburg. For the same reasons as those given in the *Minden* case, the "held covered" clauses have no application to the voyage from Vigo to Hamburg. My conclusion is that, as in the *Minden* case, so here, while on their way to, and on arrival at, Germany, the goods were not upon any adventure covered by the policy. This view concludes the whole matter. However, there is one other contention of the plaintiffs with which I will deal in case the conclusion thus reached is wrong, and that is the altern-

ative contention that there was a partial loss at Hamburg. This claim is put in this way. If it is to be said that the plaintiffs suffered no total loss at Hamburg because, by complying with the terms demanded and making certain payments, they might have recovered their goods, then there must have been a partial loss measured by the amount of these

- A necessary payments. Since, it was said, the policy covers "all risks," it includes the risk of having the goods held and to be recovered only by making the payments demanded as the price of returning the goods. The plaintiffs' counsel conceded that there was no question of such a partial loss as this at Vigo, because the goods were carried on to
- B Hamburg without the payments demanded at Vigo having been made.
- * If one supposes for the moment that the expression "all risks" in the policy is to be construed as covering the risk of having the goods held against payment of such demands, the plaintiffs, on the facts, are not in a position to show that they suffered the loss of the moneys demanded.
- C They did not make the payments or any of them. They are not, and never have been, under any legal liability to make such payments. On the facts, all that is established is that there was a time when they might have incurred these charges, or, as they seek to express it, suffered this partial loss. If they had actually incurred these expenses and thereby
- D obtained the goods, they would have asked for them, I suppose, under the suing and labouring clause, but they have never incurred them.

- Even if the expression "all risks" includes, as was argued, the risk of having the goods held and to be recovered only by making the payments demanded as the price of returning the goods, this risk is not
- E turned into a loss in respect of which the assured can claim until he has to make the payment demanded, or has it to incur liability therefor. The object of the policy is not to insure the cargo owner against the risk of mere demands, whatever may be said about its being intended to recoup him for payments he may have to make in response to such
- F demands. Furthermore, there are a number of sections grouped together in the Marine Insurance Act, 1906, numbered 64 to 66 inclusive, under the sub-title "Partial losses (including salvage and general average and particular charges)." Those sections deal with particular average loss, particular charges, salvage charges and general average
- G loss. It is significant that they nowhere make provision for such payments as those claimed in this case as partial losses. The plaintiffs' claim is not merely a novel form of partial loss, but is one of which, apparently, the framers of the Marine Insurance Act, 1906, were oblivious.

- H In every one of the cases cited during the plaintiffs' argument in support of this "partial loss" claim, the sums in question had been either paid or assessed by a competent court. Whether or not the payments in question, if made, could have been a partial loss in law, the simple answer seems to me to lie in the fact that no such loss has been incurred by the plaintiffs. In the last alternative, the plaintiffs ask for a declaration that they are entitled to pay the sums mentioned

in the letter to them from the London Chamber of Commerce, dated Apr. 27, 1940—namely, full freight and 13 per cent. of the c.i.f. value of the goods, quay dues and warehouse rents accruing since discharge of the goods at Hamburg, in an endeavour to obtain the release of the goods, as “suing and labouring” charges under the policy, and that, upon making such payments, the plaintiffs will be entitled to be reimbursed by the underwriters of the policy in question. As a matter of discretion, apart from all other reasons, such a declaration should not, in my view, be made by the court. The plaintiffs are asking the court to declare what will be the plaintiffs’ rights against the underwriters in the future if, though on the facts it seems quite improbable, the plaintiffs ever make the payments in question. Exactly what payments are to be made, and to what amount, is uncertain, however, and whether or not by making the payments indicated the plaintiffs can at this date or hereafter obtain their goods is also uncertain, and in addition seems improbable. Moreover, I am not persuaded that the plaintiffs have any intention whatever of making the payments, and it certainly is not a case where they are in any danger of being forced to do so.

Applying the test suggested in *Curtis v. Sheffield* (24), I ask myself whether or not there are special circumstances to satisfy the court that it is desirable at once to decide on future rights, and the answer seems to me, in the circumstances, to be that there are not. I have dealt with this question of the declaration as it was faintly outlined at the trial, but, discretion apart, for the reasons I have given, in my view, the underwriters were no longer concerned when the ship was at Hamburg.

Judgment for the defendants.

W. W. HOWARD BROTHERS & COMPANY, LIMITED
v. LEONARD EUSTACE KANN.

HILBERY, J.: In this case, the facts as stated by the parties are as follows:

(1) The plaintiffs are W. W. Howard Bros. & Co., Ltd., and they were at all material times the owners of the goods hereinafter referred to which consisted of sawn prime jarrah boards. (2) The said goods were to be transported from Bunbury, Australia, to London via the Cape of Good Hope in the s.s. Halle. The Halle was a German-owned vessel. (3) The said goods were insured by the defendant and other underwriters on the voyage aforesaid against both war and marine perils by a policy annexed hereto marked “A.” Both plaintiffs and defendant are British subjects. (4) The Halle sailed from Bunbury with the insured goods on board shipped under bills of lading dated July 27, 1939, and annexed hereto marked “B.” The Halle called at Durban on Aug. 16 and passed the Cape of Good Hope on Aug. 18, 1939, and on a normal voyage she would have arrived in London about Sept. 16, 1939. (5) The subsequent movements of the Halle were as follows: Arrived at Bissao, Portuguese Guinea, on Sept. 6, 1939. Sailed from Bissao on Oct. 13, 1939. There was risk of capture at the date when the Halle sought shelter at Bissao. (6) On Oct. 16, 1939, the Halle in the presence of a French warship was scuttled by those on board of her and was lost with all her cargo including the goods aforesaid. (7) As from Sept. 3, 1939, there was an effective blockade of all German ports by the British and French naval forces who were further taking all possible steps to intercept capture or destroy all German merchant vessels on

the high seas. (8) At all material times the German government in furtherance of German war policy had taken control of all German-owned merchant shipping and had given orders to all such vessels and their masters to take refuge in neutral ports and if possible to return to Germany with their cargoes or as a last resort to scuttle their vessels. (9) At no time was any notice of abandonment given by the plaintiffs to the defendant or other underwriters and no additional premium in respect of any deviation or change of voyage was ever tendered or paid. (10) It is agreed that the court may draw inferences of fact.

A The policy in this case, which is in the standard form including marine and war risks and the bills of lading, is, it is agreed, to be taken to be included in the statement of facts. The policy is warranted free in the same terms as in the cases of the *Minden* and the *Wangoni*. The
B plaintiffs' claim is again for an actual loss at the time of the scuttling, or for a constructive total loss either when the captain went to Bissao with the intention of holding the cargo for, or to the order of, the German government or of not delivering the same to or for the plaintiffs, or when the captain left Bissao with the intention of returning with the
C goods on board to Germany or of holding the cargo for, or to the order of, the German government or of not delivering it to or for the plaintiffs.

As in the other two cases, I do not think that there is any ascertained fact from which I can infer with any degree of certainty that the master of the vessel had the intention of holding cargo for, or to the orders of,
D the German government, and not delivering it to or for the plaintiffs, when he went to Bissao. At the time he acted thus, he may or may not have been in possession of the German government's orders. He had left Bunbury, Australia, as early as July 27, at which date he may very well not have been in possession of the orders. From the fact
E that he arrived at Bissao, I am able to infer that he deviated and sought the refuge of a neutral port, most probably to get orders if possible through the German consul there. In acting thus, he was not "taking" the goods at sea or restraining them as the agent of the German government, and there was not, in this deviation to avoid the risk of capture,
F any loss of the goods through a peril insured against.

However, when he took his departure from Bissao, I know he left for Germany. There can be no doubt of this, for the parties have argued the case on that assumption. This departure is the second date at which the plaintiffs in their particulars under para. 3 of the statement
G of claim put their alleged constructive total loss, but, even if, when the master took his departure for Hamburg from Bissao, there was a constructive total loss from restraint of princes, a peril insured against, for the reasons which I gave in the case of the *Minden*, that loss was also, at the same time and on the same facts, brought about by the frustration
H of the adventure caused by restraint of princes, and, as this latter of the two causes producing the loss is the risk of which the policy is warranted free, the plaintiffs cannot divorce the former cause from it and recover under the policy. I have already given my reasons for this view, and I will not repeat them. If I am right in my view that the adventure the subject-matter of the insurance was frustrated when

the master sailed from Bissao, the subject-matter of the policy was gone, and the underwriters were no longer at risk with regard to the cargo when it was on its voyage back to Hamburg. For the same reasons as I gave in the case of the *Minden*, I am of opinion that the "held covered" clauses have no application to the voyage from Bissao to Germany upon which this vessel was when she was scuttled in the presence of a French warship. There must, therefore, be judgment in this case also for the defendants. A

Judgment for the defendants.

Solicitors: *Slaughter & May* (for the plaintiffs in the first action); *William A. Crump & Son* (for the plaintiffs in the second and third actions); *Ince, Roscoe, Wilson & Glover* (for all the defendants). B

[Reported by D. K. BELCHER, Barrister-at-Law.]

Re SYKES, YOUNGHOUSE v. SYKES. C

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), July 25, 26, September 19, 1940.]

Wills—Construction—Option to purchase shares—Donee assigning benefit of option and dying without exercising it—Whether option exercisable by donee's executors or by assignees. D

The testator by his will dated Feb. 15, 1911, gave his son an option to purchase certain shares upon the death of the testator's wife or previously thereto whenever the trustees should proceed to realise that part of his estate. During his lifetime, the son assigned the benefit of the option to trustees for the purpose of securing an annuity for his wife. He survived the testator's wife, but died without having exercised the option:— E

HELD: (i) (LUXMOORE, L.J., *dissenting*) the option to purchase was personal to the son, and was not exercisable after his death by his executors or assignees.

(ii) the question as to whether an option given by a will is personal only or is transmissible must in every case depend upon the terms of the will. F

Decision of BENNETT, J. ([1940] 2 All E.R. 492) affirmed.

[EDITORIAL NOTE.] An option to purchase property given by a will must be construed according to the terms of the will. It would appear to be necessary to find express words in the will pointing to a transmissible option if the option is to be construed otherwise than as a personal one. In a dissenting judgment LUXMOORE, L.J., expresses the view that the option in the present case was of so great a benefit to the son that it was transmissible. G

AS TO OPTIONS TO PURCHASE IN WILLS, see HALSBURY, *Hailsham Edn.*, Vol. 34, pp. 34-36, para. 29; and FOR CASES, see DIGEST, Vol. 44, p. 211, Nos. 384-386.] H

Cases referred to:

- (1) *A.-G. v. Oldham*, [1940] 1 K.B. 599; [1940] 2 All E.R. 321; Digest Supp.; *affd.*, [1940] 3 All E.R. 450.
- (2) *Re Cousins, Alexander v. Cross* (1885), 30 Ch.D. 203; 44 Digest 211, 386.
- (3) *Wright v. Morgan*, [1926] A.C. 788; 43 Digest 781, 2218; 95 L.J.P.C. 171; 135 L.T. 713.

- (4) *Belshaw v. Rollins*, [1904] 1 I.R. 284; 44 Digest 211, case 385 i.
- (5) *Tolhurst v. Associated Portland Cement Manufacturers (1900)*, *Associated Cement Manufacturers (1900) v. Tolhurst*, [1902] 2 K.B. 660; 8 Digest 424, 29; 71 L.J.K.B. 949; 87 L.T. 465; *affd. on other grounds*, [1903] A.C. 414.
- (6) *Re Whitfield* (1920), 125 L.T. 61; 43 Digest 932, 3702.
- A (7) *Taylor v. Cooper* (1846), 8 L.T.O.S. 134; 44 Digest 211, 385.
- (8) *Radnor (Earl) v. Shafto* (1805), 11 Ves. 448; 44 Digest 211, 383.
- (9) *Arthur v. Mackinnon* (1879), 11 Ch.D. 385; 44 Digest 214, 411; 48 L.J.Ch. 534; 41 L.T. 275.
- (10) *Re Wavertree of Delamere (Baron)*, *Rutherford v. Hall-Walker*, [1933] Ch. 837; Digest Supp.; 102 L.J.Ch. 367; 149 L.T. 418.
- B (11) *Re Madge, Pridie v. Bellamy* (1928), 44 T.L.R. 372; Digest Supp.

APPEAL by the defendants Skelton, Dyson and Matthews from an order of BENNETT, J., dated Apr. 11, 1940, and reported [1940] 2 All E.R. 492, where the facts are fully set out.

C Wilfrid M. Hunt (for T. A. C. Burgess on war service) and L. M. Jopling for the appellants.

H. B. Vaisey, K.C., and D. W. Markwick (for H. L. A. Hart on war service) for the respondents.

E. M. Winterbotham for the trustees of the will.

D Hunt: *Re Cousins, Alexander v. Cross* (2) was decided upon the language of the particular will, and that case lays down no general principle. In the present case, the option is a valuable one, and is assignable. The mere fact that the option is given to the son only in itself shows nothing. On the true construction of the will, the testator intended to deplete his estate to the amount of the excess value of the shares and to give the amount to his son. [Counsel referred to *Wright v. Morgan* (3), *Belshaw v. Rollins* (4), *Tolhurst v. Associated Portland Cement Manufacturers (1900)* (5), *A.-G. v. Oldham* (1) and *Re Whitfield* (6).]

E Jopling: There is very little authority upon this point. In *Taylor v. Cooper* (7), it was held that the gift was not a personal one, and was not lost by the death of the legatee in the lifetime of the widow. In the present case, the testator intended to treat his sons equally except in respect of these particular shares, the excess value of which was to go to the son to whom the option was given. In every specific bequest, a testator contemplates that some particular person shall benefit.

G Vaisey, K.C.: The judgment of BENNETT, J., was right. The statement in JARMAN ON WILLS, 7th Edn., is perfectly accurate. It is correct in principle. If an option is given to a person by will, *prima facie* that option is personal. If, however, the presumption is that the option is transmissible, there are other indications in the will now before the court. Where, in relation to an option, the personality of the named person is of the essence of the gift, it follows that the benefit is not transmissible. The option to select may be a most valuable piece of property, but it does not follow from that that the right can be transferred. The testator may have been willing to leave the exercise

of the option to his own son, but it does not follow that he would have agreed to leave the exercise of that discretion to others. An option is in the nature of a conditional gift. The question is as to what the condition is. The condition is the act of volition on the part of the named person. It is the exercise of volition by the person or persons concerned. As to whether or not the option is property, the answer is to be found A as stated by COTTON, L.J., in *Re Cousins, Alexander v. Cross* (2). If the option is given by contract, the presumption may well be that the option continues to the grantee's personal representatives, because the option must be construed *contra proferentes*. If a man gives an option for value, he cannot be heard to say that it is limited. In a will, however, the matter is one of pure bounty, and the beneficiary is not entitled B to extract more than he finds in the will. By the will the son Edward is given a right which depends upon the exercise of an act of volition. Having regard to all the circumstances, the option, in the present case, is one which had to be exercised by the son personally. It could not C be exercised by anyone else. It is not essential to my argument that the statement in JARMAN ON WILLS, 7th Edn., is correct. The matter is mainly one of construction. However, as far as principles arise, they should be decided in my favour. [Counsel referred to *Radnor (Earl) v. Shafto* (8), *Arthur v. Mackinnon* (9), *Re Wavertree of Delamere (Baron)*, D *Rutherford v. Hall-Walker* (10) and *Re Madge, Pridie v. Bellamy* (11).]

CLAUSON, L.J.: In the unavoidable absence of SCOTT, L.J., I propose to read the judgment of SCOTT, L.J., and myself. William Shaw Sykes made his will on Feb. 15, 1911, and thereby gave all his E real and personal estate to his wife Clara and his sons Edward and Leonard upon trust for sale and conversion with the fullest discretion to postpone the sale and conversion, and upon trust to invest the ultimate proceeds of conversion and to pay the income of the trust moneys and investments to his wife Clara for her life, and he declared F that after her death his trustees should stand possessed of the trust premises upon trust for his sons Edward and Leonard in equal shares. Both Edward and Leonard survived the life tenant, and it is unnecessary to state the provisions made for the event of either predeceasing the life tenant. The will continued as follows: G

Whereas part of my estate consists of the shares in the English Card Clothing Co., Ltd., now standing in the name of my son Edward Musgrave Sykes as registered owner, and I am desirous that my said son shall have the opportunity of becoming H absolute owner of the same shares now I hereby declare and direct that upon the decease of my said wife or previously thereto in case or whenever my trustees shall proceed to realise the part of my estate consisting of or including such shares and my beneficial right thereto and ownership thereof my son Edward Musgrave Sykes shall have the option of purchasing and becoming absolute owner of the said shares or any part thereof and all my estate interest right and title therein and thereto the value of such shares for the above purpose to be estimated at par value.

It appears from the memorandum of association and the articles, copies of which were furnished to this court, that the company had

been formed in 1897 to amalgamate four card clothing concerns, one of which belonged to the Sykes family. In 1916, at meetings at which a member of the Sykes family presided, new articles were adopted, the company having by that time become a private company in the strict technical sense, with restrictions on transfer of the usual character, giving the directors a right to require any intending transferor of shares to offer the shares to them at the market prices, to be fixed annually by the auditors.

The testator died on Sept. 9, 1916, and the widow and the son Edward shortly afterwards proved the will. Three hundred shares of £10 each in the English Card Clothing Co., Ltd., belonging to the testator were registered at the time of his death in the name of the son Edward. These 300 shares were subsequently subdivided into 3,000 shares of £1 each. In 1918, 1,500 bonus ordinary shares of £1 each were issued to Edward as the holder of the 3,000 shares.

The trustees did not realise the shares during the widow's lifetime. She died on May 18, 1939, and there is no doubt that, upon the terms of the will, Edward thereupon became entitled to purchase the 3,000 shares at par, and thus make himself complete beneficial owner of the shares. He did not exercise the option, but died on June 29, 1939.

There are, however, two parties before the court claiming the right now to become owners of the 3,000 shares and also of the 1,500 bonus shares on paying the par value. Those parties are, first, the executors of Edward, and, secondly, certain trustees claiming under a deed of July 26, 1932. By this deed, Edward had covenanted with his former wife and the trustees to pay an annuity to his former wife, and had purported to assign to the trustees, by way of security, his interest under the testator's will in the 4,500 shares, with the full benefit of, and the right to exercise, the option given to him of purchasing, and becoming owner of, those shares at the par value thereof. Both sets of claimants have given notice to the present trustees of the testator's will purporting to exercise the option. It is common ground that the shares are worth about two-and-a-quarter times the par value. As between the two sets of claimants to exercise the option, no real question arises. If the executors can now exercise the option, they are obviously bound, by reason of their testator's deed, to give the trustees of that deed the benefit of the exercise.

As regards the ambit of the option, it was suggested (and obviously the deed of July 26, 1932, proceeded on that footing) that it covered, not only the 3,000 shares of £1 each, which represented the 300 shares which belonged to the testator at the time of his death, but also the 1,500 bonus shares. In the view which the judge took—namely, that the option was not exercisable by either set of claimants—it became unnecessary for him to deal with this question. In this court, having regard to the decision of WROTTESELEY, J., in *A.-G. v. Oldham* (1), since affirmed in this court, the point was not pressed, and, in effect, it was

conceded that the ambit of the option must on any view be treated as confined to the 3,000 shares.

The question which remains for decision, however, is whether or not having regard to the terms of the will, either of the two parties who now claim to be entitled to the benefit of the option is properly so entitled. The judge took the view that he was bound by authority to hold that an option given by a will is *prima facie* personal to the party to whom it is given, and that, as he could find in the will no language to indicate that the option given by the testator to Edward was to be exercised by any person other than Edward, he was bound by authority to hold that the option ceased to be exercisable on Edward's death. He intimated, however, as we understand his language, that he was disposed to think that, on the true construction of the will, the testator was contemplating and intending that the option should be exercised by Edward only. A B

In our judgment, the problem is to be approached by considering, in the first place, what are the true intention and meaning of the testator as appearing from the language of the will. It appears to us to be clear that he does not contemplate Edward as having any right to purchase the shares until the death of the widow, save in the event, which did not in fact happen, of the trustees proceeding to realise the shares. He does clearly contemplate that on the death Edward should have the right, if he thought proper to exercise it, of purchasing the shares, but he gives the right in terms to Edward, and to no one else. It would, of course, have been open to him to confer the option on Edward, his executors, administrators and assigns. It would also have been open to him to express his wishes in the form of a conditional gift, and to say that, on the widow's death, or on any other specified event, the shares should become Edward's property, subject to the condition of his paying the par value of them to the estate. He has not taken either of these courses, and we see no reason for departing from what appears to us to be the strict meaning of the words he uses, or to hold that the option is exercisable by anyone but the person named—namely, Edward—or at any time but at the time indicated—namely, in the events which happened, at the widow's death, or within a reasonable time thereafter. C D E F

We thus reach the same conclusion as did the judge, but we are not in accord with his view that he was bound by authority. It is true that, in *Re Cousins, Alexander v. Cross* (2), LINDLEY, L.J., indicates that it is important, in construing the words of the will, to ascertain whether they exhibit an intention on the testator's part that the executors, administrators or assigns of the person to whom the option is given are to be entitled to exercise the option, but that case cannot, in our judgment, be treated as laying down any principle, unless it is that attention must be paid to the words of the will in ascertaining the testator's intentions as to the person or persons by whom the option is to be exercisable. Each case must depend, in our judgment, on the G H

language used by the testator, and it may be well to be careful not to be led away from a consideration of the testator's language by studying the language used in other wills, or considering reported cases where similar language is used, whether in testamentary or in contractual documents. Our attention was drawn to *Wright v. Morgan* (3), where
A the Judicial Committee of the Privy Council had to construe a clause directing certain trustees to offer certain land at a valuation to a named person before selling it elsewhere. Their Lordships construed the clause as creating a vested interest in the named person—that is to say, as we understand it, a vested interest in equity in the land—and pointed
B out that such an interest would be assignable. However, in the view their Lordships took of the case as a whole, the point became academic, since it was held that the person who claimed to be the assignee of the option was in any event precluded in equity from becoming transferee of the property. We cannot deduce from this decision any guiding
C principle to assist us in construing the will of the present testator. For these reasons, we agree in the result reached by the judge, and, in our judgment, the appeal should be dismissed.

In the court below, the costs were ordered to be paid out of the estate—that is to say, out of the shares of Edward and Leonard in moieties—
D and to be taxed as between solicitor and client. In this court, the costs of all parties to the appeal must be ordered to be paid out of Edward's moiety of the testator's estate, unless Leonard Sykes otherwise agrees, the costs of Younghouse, who is interested solely as a trustee of the will, being taxed as between solicitor and client.

E As there is a difference of opinion in this court, leave will, if asked for, be given to appeal to the House of Lords.

LUXMOORE, L.J. [read by CLAUSON, L.J.]: The question to be determined on this appeal arises under the provisions of the will, dated
F Feb. 15, 1911, of William Shaw Sykes (hereinafter called the testator) with regard to certain shares in the capital of the English Card Clothing Co., Ltd. (hereinafter called the company). Three hundred of these shares, which were of the nominal value of £10 per share, were, at the date of the will and at the testator's death, registered in the company's share
G register in the name of the testator's son Edward. Subsequent to the death of the testator, which happened on Sept. 9, 1916, these 300 shares were subdivided, and became 3,000 shares of £1 each. In 1918, the company issued, by way of bonus to Edward as the registered holder of the 3,000 shares, a further block of 1,500 fully-paid shares of £1 each.
H Subsequently, further shares were purchased by the testator's trustees, and these also were registered in Edward's name. It is not necessary to refer to either the 1,500 bonus shares or the further shares purchased as aforesaid, because no question has been raised with regard to them in this appeal, the appellants admitting that they cannot make any claims to any of them.

Under the testator's will, all his real and personal estate was given to his trustees upon trust for sale, conversion and investment, with power to postpone sale and conversion at their discretion. The beneficial trusts were to pay the income of the trust estate to the testator's wife for her life, and, after her death, the trust estate was to be divided between his two sons Edward and Leonard in equal shares, with certain gifts over in the event of either son predeceasing the testator's wife. It is not necessary to refer more particularly to the terms of the gifts over. The will contained directions with regard to the testator's shares in the company, and it is under these directions that the question to be determined arises. The directions are introduced by a recital in these words :

Whereas part of my estate consists of the shares of the English Card Clothing Co., Ltd., now standing in the name of my son Edward as registered owner, and I am desirous that my said son shall have the opportunity of becoming absolute owner of the same shares . . .

The directions are as follows :

. . . now I hereby declare and direct that upon the decease of my said wife or previously thereto in case or whenever my trustee shall proceed to realise the part of my estate consisting of or including such shares and any beneficial rights thereto and ownership thereof my son Edward shall have the option of purchasing and becoming absolute owner of the said shares or any part thereof and all my estate interest right and title therein and thereto the value of such shares for the above purpose to be estimated at par value.

The testator's widow died on May 18, 1939, while his son Edward died on June 29, 1939. There has been no dealing with the shares in question, except as above stated during the interval between the testator's death and the present time, except that, by a deed of security, dated July 26, 1932, and made between the testator's son Edward of the first part, Alvina Sykes of the second part, and Norman Hugh Mathews and Alan John Skelton of the third part, Edward, as beneficial owner, assigned (among other things) to Norman Hugh Mathews and Alan John Skelton as the trustees thereof the full benefit of, and the right to exercise, the option given by the testator's will to Edward :

. . . of purchasing and becoming absolute owner of the shares in the company comprised in the estate of the testator at the par value thereof.

The assignment referred to was made by way of security only. After the death of Edward, his executors, Alan John Skelton and Joe William Dyson, by notice in writing, dated Nov. 29, 1939, purported to exercise the option given to Edward by the will of the testator in respect of 4,500 of those shares, or such less number as might be the subject of the option, and later, by notice dated Feb. 14, 1940, N. H. Mathews and A. J. Skelton as trustees of the deed of July 26, 1932, as assignees of the option, purported to exercise it in respect of the same shares. The shares in question have at all material times been of a value considerably in excess of the nominal value thereof. After the death of Edward, the value of the shares was, under the provisions of the company's articles of association, fixed by the auditors of the company at just over £2 6s.

On Mar. 5, 1940, Arnold Chadwick Younghouse, as one of the trustees of the testator's will, issued an originating summons for the purpose of determining whether the option ceased to be exercisable by reason of the death of Edward without having given any notice during his lifetime of his desire to exercise it, or was validly exercised by his executors or by the trustees of the deed of July 26, 1932. The originating summons was heard by BENNETT, J., who held that, in the events which happened, the option ceased to be exercisable on the death of Edward. He based his decision on a statement to be found in JARMAN ON WILLS, 7th Edn., Vol. 1, p. 73 :

An option of purchase given by will to A.B. is *prima facie* personal to him, and does not pass to his executors on his death . . .

The decision of the Court of Appeal in *Re Cousins, Alexander v. Cross* (2) is cited in support of the statement, and BENNETT, J., held that that decision did in fact support it. The executors of Edward and the trustees of the deed of July 26, 1932, have jointly appealed from the decision of BENNETT, J., and by their notice of appeal they ask for a declaration that, upon the true construction of the will of the testator, and in the events which have happened, the option did not cease to be exercisable on the death of Edward, and was duly exercised either by the notice of Nov. 29, 1939, by his executors or by the notice of Feb. 14, 1940, by the trustees of the deed of July 26, 1932. If the court should hold that BENNETT, J., was in error in holding that the option ceased to be exercisable, then the appellants admit that the option cannot affect any shares other than the 3,000 shares representing the original 300 shares, and that they cannot contend that the 1,500 bonus shares or the further shares purchased by the trustees are subject to it. Counsel for the appellants also stated that, in the same event, it would not be necessary to determine which of the two notices was effective to exercise the option.

The first question to be considered appears to be whether the statement of the law on which BENNETT, J., relied is correct. I have read with care *Re Cousins, Alexander v. Cross* (2), and I am unable to find that the court laid down any such principle as the editor of JARMAN ON WILLS, 7th Edn., has purported to extract from it. Certainly no express statement of any such principle is to be found in the reports. As I read them, the judgment of each member of the court is based upon the construction to be placed on the words of the particular will under consideration. After stating and analysing the words of the will, SIR MAURICE BRETT, M.R., came to the conclusion, at p. 213, that the option was "a mere personal option." COTTON, L.J., said, at p. 213 :

The only question which we have to consider here is this, namely, whether the option which was given had come to an end, that is to say, whether it is an option to be exercised by the son during the limited period of his lifetime, or whether it is an option to be exercised, not only by the son, but, after he was dead, by his executors.

He decided that the option was personal to the son by reason of the terms

of the testator's will. LINDLEY, L.J., came to the same conclusion. He said, at p. 215 :

Now there is not a word in the will, which I have read, to show that the testator intended that the son's executors, administrators, or assigns should exercise that option.

He then dealt with the actual language of the will before the court, and of a codicil to it, and held that the option was a personal one under the will, and that the codicil did not make it anything else. I find that no other textbook supports the view that *Re Cousins, Alexander v. Cross* (2) lays down any such principle as that to which I have already referred. In THEOBALD ON WILLS, 9th Edn., p. 189, it is stated as follows :

Testators sometimes give options of purchasing a part of their property. Such an option may be personal to the beneficiary or it may be transmissible.

For this statement, the authority quoted is *Re Cousins, Alexander v. Cross* (2). In my opinion, the statement in THEOBALD ON WILLS, 9th Edn., is in accordance with, and is supported by, the decision in *Re Cousins, Alexander v. Cross* (2), while that in JARMAN ON WILLS, 7th Edn., is not so supported. In HALSBURY'S LAWS OF ENGLAND, Hailsham Edn., Vol. 34, p. 34, it is stated as follows :

One form of conditional gift is an option to purchase or other gift conditional on some consideration being given. A mere option to purchase given to a named donee may be personal to the donee and not transmissible . . .

The authorities stated for the last statement include *Re Cousins, Alexander v. Cross* (2). The statement continues as follows, at p. 34 :

. . . on the other hand, a gift for a named consideration is *prima facie* construed as transmissible to the donee's representatives and assigns.

In my judgment, the question whether an option given by will is personal only or is transmissible must in every case depend on the language of the particular will. It seems to me that one important matter to be considered in arriving at a conclusion on this point must be whether the option is a beneficial one, in the sense that it confers on the donee the right to acquire some item of property at a price considerably below its market value. For instance, in the case now under consideration, the shares in question were, I understand, at all material times, including the date of the will, of a value considerably in excess of their nominal value, so that the testator knew and intended that, if the option should be exercised, it would result in his son Edward acquiring for himself, and as part of his estate, the difference between the actual value of the shares and the nominal value thereof. That is to say, if the actual value was £2 6s. per share, the difference in favour of Edward would be no less than £3,900. It would certainly seem to be capricious to confer a benefit to this extent on Edward only in the event of his surviving the testator's widow and exercising the option, and not to do so if, although he survived the widow, he happened to

die before he had in fact exercised it. Further, I think it is proper to consider the precise nature of the option conferred. Edward was in fact the legal owner of the shares at the date of the will, and the testator plainly contemplated that he would continue to remain the legal owner during the life of the testator's widow, and afterwards until the shares should be sold. The right he was giving to Edward was, as stated in the recital already quoted, "the opportunity of becoming absolute owner of the shares." In other words, Edward was to be allowed to keep the shares already in his name, provided he paid to the testator's executors the par value thereof. When the option is examined in the light of the actual facts, the direction in the will appears, in effect, to be the same as a direction that Edward shall be entitled to keep the shares in question if a payment of a sum equal to the nominal value of the shares is paid to the testator's executors. It seems to me that there is less foundation for holding that an option is personal to the donee where the result of its exercise confers a large pecuniary benefit than where the option is to buy at a valuation, for, in the former case, it would seem to be the intention of the testator to confer on the donee of the option a benefit translatable into terms of pounds, shillings and pence. Our attention was called to *Wright v. Morgan* (3), a decision of the Privy Council in an appeal from the Court of Appeal of New Zealand. In that case, a testator who owned estates at Ashburton, in New Zealand, provided by his will that such estates should be offered to his son Harry at a valuation. After the testator's death, Harry sold the benefit of this option to his brother Douglas. Douglas purported to exercise the option, and questions arose with regard to the validity of the purchase of these estates by Douglas, the first question being whether the option was assignable or was personal to Harry. The material words of the testator's will were these :

... my said trustees shall not sell my freehold estate in the county of Ashburton or any part thereof until the same shall have been offered . . . to my said son Harry Herbert Wright at a valuation . . . nor until my said son Harry Herbert Wright shall have refused or omitted to notify in writing to [the trustees] . . . his acceptance of the offer within three months after the making thereof . . .

The trial judge held, among other things, that the option was assignable. The Court of Appeal of New Zealand held that it was not assignable. When the case was before the Privy Council, LORD DUNEDIN said, at pp. 795, 796 :

The leading question accordingly is whether the option to purchase given by the will to Harry Herbert was assignable and assigned to Douglas. . . . Speaking generally, any vested interest is assignable unless there is something in the nature of the interest, or something in the words of the settlement which creates the interest which contradicts the nature of assignability. Their Lordships do not doubt that Harry Herbert's option might have been assigned to a third person. There is nothing in the nature of the interest itself which points to non-assignability, nor are there any words in the will which would seem to forbid assignation.

These words seem to me to lay down a general principle of construction, and are not confined to the particular question of the construction of

the particular will. In the present case, the subject-matter of the option is the beneficial interest in shares in a limited liability company. There appears to be nothing in its nature to point to non-assignability, and I am quite unable to discover any words in the will which could properly be said to forbid assignment. The absence of any reference to the executors, administrators and assigns of Edward does not seem to me to be sufficient for such purpose. There is, moreover, in the present case, no direction to the testator's trustees to offer the shares to Edward before selling to anyone else. Instead of any such direction, the option is given direct to Edward, who is already the registered owner of the shares the subject-matter of the option. All that has to be done if the option is exercised is to pay to the trustees of the testator's will £3,000, and it seems to me that the identity of the payer cannot have been a matter of moment to the testator's mind when he made his will.

For the reasons I have endeavoured to state, I have come to a conclusion different from that of SCOTT and CLAUSON, L.JJ. I would allow the appeal and discharge the order of BENNETT, J., so far as it declares that the option in question ceased to be exercisable on the death of Edward. In lieu thereof, I would declare that such option did not cease to be exercisable on the death of Edward by the persons claiming under him. I would not interfere with the order as to costs made in the court below, and I would make a similar order as to the costs of all parties to this appeal.

Appeal dismissed with costs. Leave to appeal to the House of Lords.

Solicitors: *S. F. Miller, Matthews & Co.*, agents for *Taylor, Kirkman & Mainprice*, Manchester (for the appellants); *Skelton & Co.*, Manchester (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

R. v. WESTMINSTER ASSESSMENT COMMITTEE, *Ex parte* GROSVENOR HOUSE (PARK LANE), LTD.

[COURT OF APPEAL (Scott, Clauson and du Parcq, L.JJ.), **August 15, 16, 19, September 19, 1940.**]

Rates and Rating—Assessment—Provisional list—Objection to proposed assessment—Judicial discretion of assessment committee—Report of competent valuer not seen by parties concerned—Rating and Valuation Act, 1925 (c. 90), s. 38, Sched. IV, Pt. III, para. 3.

On objection being taken to certain provisional assessments of the applicants' property, the assessment committee requested a rating surveyor representing the applicants to consult with the city valuer with a view to endeavouring to agree the figures in respect of the property. The surveyor and valuer agreed the figures at £16,125 gross and £13,434 rateable, and then appeared before the committee and announced these figures. The committee then adjourned, and at a subsequent meeting decided to amend the list by putting in the values of £25,800 gross and £21,497 rateable value. It was stated in an affidavit by a member of the committee that, in addition to the above information, they had

also had before them a general report from one E., a well-known surveyor, as to the effect of the war on the value of hotels and the factors producing such effect. The applicants asked for an order of *certiorari* to quash the determination of the committee, and for an order of *mandamus* ordering the committee to determine the objection by substituting for the values entered in the provisional valuation list the values gross value £16,125, rateable value £13,434:—

HELD: (i) the assessment committee was not bound to accept the figures agreed between the rating authority and the ratepayer.

(ii) in view of the fact that the committee considered and gave weight to evidence which was not communicated to the parties, the respondents were entitled to have the determination of the committee quashed.

per CLAUSON and DU PARCQ, L.JJ.: after hearing all evidence and argument in a judicial spirit, the committee must exercise its own judgment.

Decision of Divisional Court ([1940] 3 All E.R. 241) *affirmed on other grounds.*

[EDITORIAL NOTE.] The valuation of property is in many cases a matter upon which opinions may vary, and, in many cases, an assessment committee is faced with a very difficult task. At the same time, it must regulate its proceedings upon judicial principles, and, if any valuation of the property or other matter is brought to its notice as something upon which it might found its decision, it must make that valuation known to the parties, so that they can make any observations upon it which they think fit. When it has heard all the evidence and the argument, the members of the committee must, in reaching a decision, exercise their own judgment, and are not prevented from taking into account matters within their own knowledge, e.g., their own knowledge of local conditions..

AS TO PROCEEDINGS OF ASSESSMENT COMMITTEE, see HALSBURY, *Hailsham Edn.*, Vol. 27, pp. 470, 471, para. 900; and FOR CASES, see DIGEST, Vol. 38, p. 579, Nos. 1145-1147.]

Cases referred to:

- (1) *Gateshead Assessment Committee v. Redheugh Colliery, Ltd.*, [1925] A.C. 309; 38 Digest 604, 1309; 94 L.J.K.B. 258; 132 L.T. 583; *affg.*, [1924] 1 K.B. 369.
- (2) *London County Council v. Islington Assessment Committee*, [1915] A.C. 762; 38 Digest 643, 1609; 84 L.J.K.B. 1942; 113 L.T. 289.
- (3) *R. v. Board of Education*, [1910] 2 K.B. 165; 42 Digest 614, 141; 79 L.J.K.B. 595; *sub nom. R. v. Board of Education, Ex p. Swansea, Oxford Street (Church of England) School Managers*, 102 L.T. 578; *affd. sub nom. Board of Education v. Rice*, [1911] A.C. 179.
- (4) *Royal Agricultural Hall Co. v. Islington Assessment Committee*, [1918] A.C. 525; 38 Digest 643, 1611; 87 L.J.K.B. 793; 119 L.T. 165.
- (5) *Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Committee*, [1932] 2 K.B. 679; Digest Supp.; 101 L.J.K.B. 632; 147 L.T. 390.
- (6) *R. v. Cornwall County Valuation Committee, Ex p. Falmouth Rating Authority*, [1937] 2 K.B. 222; [1937] 2 All E.R. 266; Digest Supp.; 106 L.J.K.B. 703; 157 L.T. 157.
- (7) *London County Council v. Shoreditch Borough Council* (1911), 105 L.T. 515; 38 Digest 647, 1658.
- (8) *R. v. North Worcestershire Assessment Committee, Ex p. Hadley*, [1929] 2 K.B. 397; Digest Supp.; 98 L.J.K.B. 605; 141 L.T. 557.
- (9) *R. v. Surrey Assessment Committee, North-Eastern Assessment Area, Ex p. Woolworth (F. W.) & Co., Ltd.*, [1933] 1 K.B. 776; Digest Supp.; 102 L.J.K.B. 763; 148 L.T. 428.

- (10) *R. v. Salford Assessment Committee, Ex p. Ogden*, [1937] 2 K.B. 1; [1937] 2 All E.R. 98; Digest Supp.; 106 L.J.K.B. 344; 156 L.T. 474.
- (11) *Re Enoch & Zaretsky, Bock & Co.*, [1910] 1 K.B. 327; 22 Digest 465, 4875; 79 L.J.K.B. 363; 101 L.T. 801.
- (12) *Boulter v. Kent JJ.*, [1897] A.C. 556; 16 Digest 99, 6; 66 L.J.Q.B. 787; 77 L.T. 288.
- (13) *Sharp v. Wakefield*, [1891] A.C. 173; 30 Digest 12, 49; 60 L.J.M.C. 73; 64 L.T. 180; *affg.* (1888), 22 Q.B.D. 239.

APPEAL by the assessment committee from an order of the Divisional Court (CHARLES, HUMPHREYS and ASQUITH, JJ.), dated May 30, 1940, and reported [1940] 3 All E.R. 241. The facts are fully set out in the judgment of SCOTT, L.J.

R. M. Montgomery, K.C., and *Harold B. Williams* (for *Michael E. Rowe* on war service) for the appellants.

A. S. Comyns Carr, K.C., and *F. Grant* for the respondents.

Montgomery, K.C.: The fact that the parties have agreed a figure cannot bind the assessment committee, because other ratepayers are interested in the matter. The committee must decide after hearing evidence. Having heard the parties, however, the assessment committee is free to employ a surveyor to make a report, and there is nothing to prevent the committee from making an alteration in the list, or from refusing to make an alteration, as it thinks right. The assessment committee was entitled to act upon the fresh evidence. A court cannot act upon its own knowledge, and cannot get evidence outside and act upon that, without hearing the parties upon it. Therefore, the comparison of the assessment committee with a judicial body shows a difference in this respect. The assessment committee might fix a figure which, in its view, is correct. Otherwise, the assessment committee might be in the hands of the two rating surveyors. It occupies, however, an independent position. It is not certain that there is any authority as to whether or not the committee was bound to communicate what was in its mind. If there was no need to communicate, there is no ground for *mandamus*. The assessment committee is entitled to act upon the report without communicating the contents to the objector. Strictly speaking, there is no appeal from the assessment committee. The appeal is from the act or omission of the assessment committee acting in a ministerial capacity. *Prima facie*, the rating authority is the respondent. However, there is statutory power for the assessment committee to defend and to get itself entered as respondent. An assessment committee has no power to state a case. It is the duty of the assessment committee to make an accurate list to the best of its ability. The committee may make alterations without any objections having been made. If there is no excess of jurisdiction and no such impropriety of conduct to prevent the decision from being within the jurisdiction of the committee, *certiorari* will not lie. If, however, it should be held to lie, and if *mandamus* should follow, the order should be for the committee to hear and determine the whole matter again.

[Counsel referred to *London County Council v. Islington Assessment Committee* (2), *Royal Agricultural Hall Co. v. Islington Assessment Committee* (4) and *Gateshead Assessment Committee v. Redheugh Colliery, Ltd.* (1).]

Comyns Carr, K.C. : I accept the proposition that for either *certiorari* or *mandamus* it is insufficient for me to show that the figure which the

- A assessment committee has inserted is a wrong figure. I must go further and show that the committee has acted in a manner which is contrary to law. Each of the three grounds of objection which have been taken in this case fulfils the conditions necessary to justify the Divisional Court in making the order of *certiorari* and *mandamus*. The following
- B are the points of objection. First, there was no evidence before the assessment committee on the basis of which the committee could insert in the list any figure other than that agreed between the rating authority and the ratepayer. Secondly, when the rating authority and the ratepayer—or the two surveyors who were authorised to act on behalf of
- C their respective employers—have agreed upon a figure, the assessment committee has no power to go behind the agreement and insert some other figure. That point is to some extent strengthened by the fact that the meeting for the purpose of arriving at an agreement took place at the request of the assessment committee. Even if it should be wrong
- D to say that the assessment committee cannot go behind an agreement independently arrived at by the rating authority and the ratepayer, it is right to say that the committee cannot do so when the parties have arrived at an agreement at the request of the assessment committee. Thirdly, the assessment committee had no power to take into considera-
- E tion the report of Eve, the existence and contents of which were not disclosed to the parties. The assessment committee would have been entitled to tell the two surveyors that it would accept their decision if they came to an agreement. If the committee said so, the figure agreed must be accepted. It is not a question of delegating the
- F matter to two agents. It is a question of seeing if the parties can agree. When hearing objections, the committee ceases to act in a ministerial capacity, and then acts in a judicial capacity. It is a complete fallacy to imagine that the assessment committee has any particular duty to look after the interests of the general body of ratepayers as distinct
- G from the parties before it. The rating authority is the body which is primarily charged with looking after the general interests of the ratepayers and with seeing that no particular ratepayer is assessed at a figure which is too low. Uniformity must be obtained by seeing that each assessment is correct. The rating authority is not likely to agree
- H to figures lower than those which the assessment committee has fixed on other occasions. The assessment committee is bound to act as any other judicial tribunal acts. It cannot go outside a settlement arrived at by the parties. It cannot act against the evidence, and it cannot act upon any evidence which has not been communicated to the parties. In dealing with objections, the assessment committee is not entitled

to invoke any administrative or ministerial powers. It must do, or refuse to do, that which the objector asks it to do. It is bound by the agreement between the parties. Alternatively, it is bound by the only evidence before it. This was the evidence of the two surveyors, whose evidence was to the same effect. [Counsel referred to *Ladies' Hosiery & Underwear, Ltd. v. West Middlesex Assessment Committee* (5), *R. v. Cornwall County Valuation Committee, Ex p. Falmouth Rating Authority* (6), *London County Council v. Shoreditch Borough Council* (7), *R. v. North Worcestershire Assessment Committee, Ex p. Hadley* (8), *R. v. Surrey Assessment Committee, North-Eastern Assessment Area, Ex p. Woolworth (F. W.) & Co., Ltd.* (9), *R. v. Salford Assessment Committee, Ex p. Ogden* (10), *R. v. Board of Education* (3), *Re Enoch & Zaretsky, Bock & Co.* (11) and *Royal Agricultural Hall Co. v. Islington Assessment Committee* (4).]

Montgomery, K.C., in reply : In the present case, there is no suggestion that the assessment committee got any statement of fact from Eve. The report contains advice, and the Rating and Valuation Act, 1925, s. 38, would be rendered useless if the committee could not get advice. There is nothing unfair in what has been done. There is no suggestion that new facts were put before the committee. The committee took advice to obtain assistance on the facts already before it. [Counsel referred to *Boulter v. Kent JJ.* (12) and *Sharp v. Wakefield* (13).]

SCOTT, L.J. [read by CLAUSON, L.J.] : This appeal is from an order of the Divisional Court (CHARLES, HUMPHREYS and ASQUITH, JJ.), for an order of *certiorari* to quash a "determination" by the assessment committee for the city of Westminster, on an objection by Grosvenor House (Park Lane), Ltd., to which I will refer as the company, to a "provisional valuation list" made in regard to, *inter alia*, Grosvenor House on Oct. 15, 1939, under the Valuation (Metropolis) Act, 1869, s. 47, and also for an order of *mandamus* to the assessment committee to hear and determine the objection. The "determination" which the Divisional Court in fact quashed was under sect. 47 (6), and is as follows :

The committee shall hear and determine on the objection in the same manner as if it were an objection to a valuation list, and may make such order as they think just.

The subsection thus applies the procedure in sects. 6, 7, 11 and 14 of the Act, and the important sections of the Union Assessment Committee Act, 1862, incorporated in sect. 7—a curious repetition of the incorporation in sect. 1. It was argued before us that sect. 47 excludes the sections of the 1862 Act which were specially included by sect. 7. I can see no ground for that argument, the more so as sect. 47 (6) applies the "manner" of dealing with valuation lists. Assessment committees in London are now composed as provided by the Local Government Act, 1929, s. 16 (h).

The precise question involved does not seem to have come up previously for judicial decision. A short statement of the material facts will make it clear. In the quinquennial valuation list, made in 1935, the company were assessed in respect of Grosvenor House at a gross annual value of £32,250 and a net annual value of £26,872. After the war began, the takings of the company's business fell off seriously, and the company took the view that there had been a reduction in the annual value of the hereditament from a "cause" within the opening sentence of sect. 47 of the Act :

If in the course of any year the value of any hereditament . . . is from any cause . . . reduced in value . . .

On Sept. 28, 1939, under subsect. (1), they accordingly gave notice of requisition to Westminster City Council (who had become the rating authority under the Rating and Valuation (Apportionment) Act, 1928, s. 7 (2), in place of the "overseers") for a "provisional" list. This was duly made, but, as the rating authority repeated in their provisional list the figures of the quinquennial list, the company gave notice of objection to the rating authority and the assessment committee that the assessment was excessive, on the ground that the value of the hereditament had been reduced by a cause within sect. 47—namely, a falling off of the takings by reason of circumstances resulting from the war, as stated by them in a letter of Oct. 24. In that letter, they asked that the figures of £1,000 gross and £830 rateable should be inserted. By letter dated Nov. 30, the assessment committee gave notice that the objection would be heard on Dec. 6, and added :

If you will be good enough, prior to the meeting, to submit to the city valuer a note of the following particulars it will facilitate the hearing of your case :—(a) A comparison of gross receipts for September, October and November, 1937, 1938 and 1939 ; (b) Particulars of your clients' liabilities (if any) under the War Risk (Insurance) Act, 1939 ; (c) Total expenditure on air-raid precautions.

The hearing before the assessment committee duly took place on Dec. 6, and one Faraday, surveyor on behalf of the respondents, and one Bourdas, surveyor on behalf of the rating authority, were in agreement that there had been a reduction of value by a cause within the section. Faraday gave figures of the hotel takings for September, October and November, showing a great drop in all three months as compared with the same months in 1937 and 1938, and both surveyors informed the assessment committee that, in their opinion, the proper figures to be inserted by the assessment committee in the provisional list instead of the existing figures were £16,125 gross and £13,434 net. The assessment committee, having listened to what was said, adjourned. They did not, however, on further consideration, accept the figures of the two surveyors, but, by letter dated Dec. 19, informed Faraday that they had amended the provisional list by reducing the value to £25,800 gross and £21,497 rateable respectively, thus rejecting the agreed figures of the two surveyors.

Before the Divisional Court, there were two main points made by the respondents' affidavit evidence. The first was that the assessment committee were bound in law to the figures of the two surveyors, and to no others. The argument was put on two alternative grounds. The first was that the assessment committee had invited the respondents' surveyor to agree the figures with the rating authority's surveyor, and had undertaken to accept whatever figures were agreed, and that, as the surveyors had in fact agreed, the assessment committee were bound in law to insert the agreed figures in the provisional list. One Giles, who was a member of the assessment committee, and had been chairman of it at two earlier meetings when theatres and other hotels had been discussed, denied in his affidavit that any undertaking had been given, and added the opinion that for the assessment committee to give any such undertaking would have been illegal. The alternative ground was that no evidence other than the agreed statement of the two surveyors had been before the committee at the hearing, that there was no evidence to support any other determination, and that, therefore, the committee was obliged in law to act on it. In my opinion, there was no substance in either contention. The affidavits of Giles, Eaton Smith, who was in the chair on Dec. 6, and Morris, the clerk to the rating authority, in my view dispose of any basis of fact for the alleged undertaking. The second contention, that the committee was bound by the evidence of the two surveyors, is plainly unfounded in law.

The company's second point, however, is much more serious. It arises out of a fact stated quite candidly in Giles' affidavit, where he deals with the grounds on which the company sought their orders from the King's Bench Division. In answer, he stated the material upon which the assessment committee had proceeded to arrive at their conclusion that, whilst there had been some reduction of value within the section, the right figures were the £25,800 gross and £21,497 rateable which I have mentioned. The material consisted first, he said, of the facts supplied by Faraday, and of his and the city valuer's arguments. Secondly, it consisted of :

... a general report from Mr. Charles Gerald Eve, P.P.S.I., as to the effect of the war upon the value of various classes of business premises, including hotels, and as to the factors producing such effect. . . .

Thirdly, it consisted of the expert knowledge and experience of the assessment committee itself. It was urged, both below and before us, that it was improper for the assessment committee, when acting in a judicial capacity under subsect. (6), for the purposes of "hearing and determining" the company's objection, to take into consideration evidence which it did not give the company an opportunity of inspecting, criticising and answering. Apparently the company had no knowledge of the existence of any such report till the disclosure of the fact in Giles' affidavit. It does not appear clearly whether the report was obtained

- by the committee before or after the time of the hearing on Dec. 6. If it had been already obtained before that date, I should regard it as merely one of the sources from which the committee had properly obtained its information, for it was the committee's duty, as an expert body, to inform itself, and I should not be prepared to hold that at the
- A hearing the committee came under any duty to disclose that particular source, any more than any other source of its expert knowledge. Nor was it the duty of the committee to disclose its knowledge as such. The assessment committee, except when performing the quasi-judicial function of determining an objection either to a provisional list or to
- B a valuation list, is an executive or ministerial body of an expert character, whose function is to make the list on the lines laid down by the relevant legislation, and primarily it is its duty to make itself expert and act upon its own expert knowledge, although it is entitled, under the Union Assessment Committee Act, 1862, s. 20, to employ a surveyor or take :
- C . . . such other means as they may think necessary for ascertaining the correctness [of the list].
- The express permission to employ a surveyor is given, probably, in order to authorise the necessary expenditure. Even when performing a quasi-judicial function, as on hearing objections, whether to the valuation list proper, under the Union Assessment Committee Act, 1862, s. 19,
- D or to a provisional list, under the Valuation (Metropolis) Act, 1869, s. 47 (6), the assessment committee does not sit as a court. Notice of an objection has to be given to the rating authority, but there is no *lis inter partes* between the objector and the rating authority. No
- E evidence is given in the sense of sworn evidence. There is no process of discovery, with its rules of relevancy to the issue. Indeed, there is no issue, and the assessment committee has no power to state a case for the High Court. The whole proceeding on objection is informal, as an aid to the performance by the assessment committee of its primary
- F duty, which is ministerial, as, in my opinion, is indicated by sects. 19, 20 and 21 of the Act of 1862. A similar indication is afforded by other statutory arrangements. Under the Valuation (Metropolis) Act, 1869, appeals from a valuation list are allowed either to special sessions or to quarter sessions, and the same provisions apply, under sect. 46 (4),
- G to supplemental lists, but no appeal is given from the determination of an objection by the assessment committee. The purely ministerial nature of the assessment committee's main function is, indeed, emphasised in the case of provisional lists by the very fact that the ratepayer's ultimate rights are safeguarded by the provision in sect. 47 (10) that,
- H if the valuation list in which the alterations of the provisional list are ultimately embodied is reduced on an appeal against that list, the ratepayer will get a refund of the difference.

This ministerial character of the assessment committee and the uniformly ministerial nature of its procedure have been recognised by the House of Lords in a case under the Union Assessment Committee

Amendment Act, 1864, s. 1. That Act dealt with appeals against a rate, and the case is *Gateshead Assessment Committee v. Redheugh Colliery, Ltd.* (1). That section was repealed for the metropolis by the Valuation (Metropolis) Act, 1869, and outside the metropolis by the Rating and Valuation Act, 1925, but the observations of their Lordships upon assessment committees remain unaffected. VISCOUNT FINLAY said, at A pp. 325, 326 :

In my opinion this statute has not the effect of assimilating the procedure before the assessment committee to a hearing on appeal. The assessment committee are assumed to have some practical acquaintance with rating matters and the proceedings before them are not so formal as on a hearing in court. All that the proviso in sect. 1 of the Act of 1864 does is to provide that an opportunity shall be given B to the assessment committee of setting right anything in the list which gives sufficient ground of complaint before the expense of an appeal against a rate has been incurred. The form of notice issued by the assessment committee itself was adopted C by the colliery company. I think the form was right, as notice in general terms of the nature of objection is enough to satisfy the proviso in sect. 1 of the Act of 1864. The assessment committee are experts and have expert assistance, and they may be assumed to be capable of appreciating the real point and seeing what ought to be done without a more detailed notice. If there is any obscurity D questions can be put to the complainant or his representatives. If it had been intended to impose upon the parties the burden of a preliminary hearing before the assessment committee with all the formalities of legal procedure, this would, I think, have been prescribed in clear language.

Later, LORD SHAW OF DUNFERMLINE said, at p. 329 :

The practice has been explained and is familiar. Such objections are very numerous. They are dealt with in a practical spirit. In most cases the valuer and the ratepayer or his representative meet together and endeavour to get at an agreed figure or to understand each other as to what is the real difference to be determined by the committee.

Later, LORD CARSON said, at pp. 334, 335 :

My Lords, I think it is necessary to remember that the proceedings before the assessment committee are of a very informal nature, and in no sense an appeal to a court. It is merely a proceeding to draw the attention of the committee, who has already settled the list under the procedure I have already described, to the complaint of excessive rating, and to give an opportunity to have, if possible, the matter arranged by such conferences and methods as may seem applicable. F Indeed, the proceedings before the committee in this case as described in the case stated show that there were correspondence and references to valuers, and after an adjournment the matter seems to have been decided without further hearing, and that, although the appellants had asked for a further hearing. That an objector is not bound to give evidence in support of his objection, that no oath can be administered, that there are no rules of evidence, all show that the committee is in no sense a court, and that the proceeding is an informal one with a view to arresting the attention of the committee to save, if possible, the necessity of an appeal. G Indeed, I think the very object of the section would be frustrated if at such a stage a party was obliged to employ legal advisers as to the exact points to be raised from fear he might, through any omission, be deprived of his right of appeal.

For the reasons I have given, I cannot see why an assessment committee should be under any duty, on a hearing under sect. 47 (6) of the Act of 1869, to produce a copy of a general report by a surveyor which it has H already obtained, even although it may contain some matter relevant to the objection. On the other hand, if, after the hearing, it obtains such a report, it does seem to me inconsistent with what I can only call a sense of natural fairness that, although it may be really relevant, either because it supports or because it controverts the ratepayer's

objection, the assessment committee should not disclose it to the rate-payer's adviser and give him a chance of dealing with it. On the whole, I think that, in such a case, it should resume the hearing after due notice. It is because nothing was said or done on these lines in the present case that I take the view that the assessment committee did not give an adequate "hearing." It was its duty to "hear," and I do not think that it did "hear." The order of *certiorari* was, therefore, right.

Whilst expressing this conclusion, I have thought it right to emphasise the essentially executive and non-judicial character of an assessment committee, except when called upon to "hear" an objection. Then its function becomes quasi-judicial. Subject to these observations, however, I agree with the judgment of my brethren, which I have perused. In reality, as well as in form, the *mandamus* should be limited to the duty of hearing and determining, and it would be wrong to fetter the discretion of the assessment committee any more than if the assessment committee had disclosed the report and then resumed the hearing. Its duty will still be to arrive as best it can at the true reduction in figures due to a cause within the section. The order will be as CLAUSON and DU PARCQ, L.JJ., propose.

CLAUSON, L.J. : I will now ask DU PARCQ, L.J., to read the judgment of himself and myself.

DU PARCQ, L.J. : In our opinion, the order of the Divisional Court was right, but, with great respect to the judges who composed the court, we think that some of the reasons given for it were unsound, and ought not to be regarded as a correct statement of the law. The headnote in the LAW REPORTS, which we think correctly summarises their judgments, states the decision in these words :

... the committee were bound to accept the agreed figures and to determine the case accordingly.

If that is indeed an accurate statement of the decision of the Divisional Court, it is important, in our view, that it should not be allowed to stand as an authority for the future guidance of those whom it may concern.

It is unnecessary to recapitulate the facts of the case, but, in order to explain our reasons for agreeing with the order but differing from the judgments delivered, we must state our opinion as to the duty which the assessment committee had to perform. The committee had to ascertain whether the respondents' hereditament had been "from any cause ... reduced in value." That is, it had to ascertain whether, for any reason which could properly be regarded as a "cause" within the Valuation (Metropolis) Act, 1869, s. 47, the hypothetical tenant could no longer be expected to pay the full amount of the rent assumed to have been previously payable. The committee was bound "to hear

and determine" the objection, and the use of those words in subject. (6) is enough to show that the function which it was exercising was, as LORD SUMNER said in *London County Council v. Islington Assessment Committee* (2), at p. 782, "clearly judicial." This does not mean, of course, that the committee was bound to exercise the judicial function exactly as if it had been a court of law. It could not have done so even if it would, because it had no power to hear sworn evidence. Its duty was to hear the objection in the same manner as if it had been an objection to a valuation list. Some observations in the House of Lords on the manner in which objections were heard, and properly heard, under the Union Assessment Committee Act, 1864, s. 1, are of assistance here, because it is true, we think, to say that the manner of hearing objections under that Act did not differ in any material way from the manner of hearing objections under the Union Assessment Committee Act, 1862, s. 21. We were referred to the opinions of VISCOUNT FINLAY and LORD CARSON in *Gateshead Assessment Committee v. Redheugh Colliery, Ltd.* (1), at pp. 325, 334, 335. For the present purpose, it is enough to say, without full quotation from those opinions, that the proceedings are informal, that the committee is not bound by the rules of evidence followed in courts of justice, and that the committee is assumed itself to have practical acquaintance with rating matters. It must be added that, by the Rating and Valuation Act, 1925, s. 38, the committee was expressly empowered to employ a competent adviser. Finally, it must always be borne in mind that the paramount duty of the assessment committee is to make such order as it thinks just, and that, if it should arrive at too low a figure, other ratepayers will suffer, even if the rating authority does not complain.

We now turn to the question as to whether or not the assessment committee has in any respect failed in its duty. In our opinion, it was entitled to seek the aid of the "competent person" whom it did in fact employ. Giles' affidavit tells us that the committee:

... had the advantage of a general report from Mr. Eve as to the effect of the war upon the value of various classes of business premises, including hotels, and as to the factors producing such effect.

We do not doubt that it is lawful to obtain such a general report under the Rating and Valuation Act, 1925, s. 38. We were told by counsel for the appellants that the committee obtained, or at any rate purported to obtain, Eve's report under that section, and we do not share the difficulty which HUMPHREYS, J., felt in accepting that statement. In the absence of clear evidence, we think that we ought to assume that the committee was acting in conformity with the law. *Omnia rite esse acta.* We are clearly of opinion, however, that, having obtained the report, the committee was bound to communicate to the rating authority and to the objectors such parts of it as were relevant to the inquiry. It is obvious from the reference to the report in Giles' affidavit that at least some parts of it were so relevant. We are well content to adopt and

apply to this case language used by LORD LOREBURN with regard to an inquiry by the Board of Education, when he said, in *Board of Education v. Rice* (3), that the board must always give [p. 182]:

... a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view.

- A Those words may properly be applied, in our opinion, to any inquiry of a judicial character. Counsel for the appellants suggested that LORD LOREBURN was referring only to statements of fact, and not to expressions of opinion. For all we know, there may have been statements of fact in Eve's report, but, even if there were not, it can hardly be
B doubted that expressions of opinion by an expert of acknowledged experience may be as impressive and as damaging as statements of fact.

In our opinion, the fact that the committee is entitled to obtain a report for its guidance does not relieve it of the duty of communicating any relevant part of that report to the persons seeking a determination.

- C Indeed, unless a statute expressly provided that such a report should not be communicated to those appearing before the tribunal, we think that we should assume an intention on the part of the legislature that such communication should be made. It makes no difference, in our
D opinion, whether the report was obtained before or after the commencement of the hearing, or that it was of a general, and not of a specific, character. The material question is whether or not it contained matters relevant to the inquiry and was considered by the committee in relation to the inquiry. If it did contain such matters and was so considered,
E then it is ground for complaint that the objectors never had an opportunity of dealing with it. It is as if the representatives of the rating authority and objectors had been requested to leave the room and Eve had then been called in to give evidence in their absence.

- It is said that, as the committee is entitled to use its own knowledge and experience, and is not obliged to state the result of those to the
F contestants, it must follow that it can enlarge its knowledge by calling in an independent expert without coming under the necessity of revealing his evidence. One answer to this contention—and, we think, a sufficient answer—is that the experience of an expert tribunal such as this is part of its equipment for determining the case. Litigants must take
G that experience as they find it, and, because the tribunal is assumed to be impartial, they have no grievance if they cannot test it by cross-examination. An expert witness or adviser, however eminent, is in a very different position. He must not be substituted for the tribunal. Those whose claim is being considered have a right to question and to
H test every statement he makes and any opinion he expresses. If that opportunity is denied them, justice is not done. On the ground, therefore, that the committee improperly (though no doubt with the best intentions) considered and gave weight to evidence, and, it may be, argument, which was never communicated to the parties most interested, we are of opinion that the respondents were entitled to have

the determination of the committee quashed. It follows that *mandamus* "to hear and determine" must go.

In every other respect, we are of opinion that the assessment committee proceeded in a regular and lawful manner. The Divisional Court appears to have laid it down that, where the rating authority and the objectors are the only persons appearing before the assessment committee, any figure upon which these parties agree must be accepted by the assessment committee in the absence of any evidence to the contrary. Moreover, if the view of the Divisional Court were to prevail, there might never be evidence to the contrary. HUMPHREYS, J., would permit the committee, if it thought the proposed figure wrong, to ask for further evidence, but its plea for more evidence may be disregarded, and then it would seem that it must content itself with such evidence as the persons appearing before it are "disposed to offer." With the greatest respect, we think that this is an erroneous view of the powers and duties of an assessment committee. Even in courts of law, it is not a principle of universal application that the court must give judgment for any sum, or make any order, on which the parties are agreed. We know of no case where the public interest, or, as here, the interest of a considerable section of the public, will be affected by the order in which the court is bound, or even entitled, to accept an agreed figure without the slightest investigation or examination. Nor is it true, in our view, to say that any tribunal is necessarily bound to accept evidence which is uncontradicted, or unchallenged, or "all one way." When the particular case of an assessment committee hearing an objection is considered, it seems to us, with respect to those who have thought otherwise, to be impossible to maintain that the figure agreed upon by the persons appearing before it, and supported by their witnesses, must be accepted without question. The committee heard evidence and argument. There is room for argument as to what amounts to a "cause" within the section—a question of law as to which the committee must make up its mind for itself, or with independent legal assistance. Evidence as to a question of English law there never can be, or, at any rate, there never ought to be. In so far as the evidence dealt with pure fact—for example, the receipts of the respondents' business—there is nothing to suggest that it was not accepted. A great part of the evidence must necessarily have dealt with matters of opinion. The assessment of the rent which a hypothetical tenant will pay is not an exact science. The hypothetical tenant is, after all, only the reasonable man in one of his aspects, and, although surveyors may know more than most people about the workings of the tenant's mind and the effect of such a catastrophe as a great war upon the estate market, they have not a monopoly of wisdom. Even a tribunal inexperienced in rating matters, hearing a statement which is almost inevitably a compound of fact, inference, argument and conjecture, might be excused if it did not accept all the conclusions of the expert. Here, however, we are con-

- sidering the duty of a tribunal of experts, who may take the view that the two experts whom they have heard are wrong. It is not disrespectful to the expert witnesses, we hope, to say that the committee may possibly be right and the expert witnesses wrong. If that is granted, it seems to follow that adherence to the doctrine enunciated by the Divisional Court might result in the committee being forced against its will to do injustice to a body of ratepayers. This would be a melancholy result of the issue of a prerogative writ, and it is, we think, important that this court should make it clear that the committee, while it should hear all relevant evidence and argument in a judicial spirit, must in the end exercise its own judgment according to its own conscience. We think that the order of the Divisional Court as to costs should not be disturbed. As the assessment committee could not safely omit to appeal to this court, and its appeal has succeeded in one important particular, though not wholly, we think that the appeal should be dismissed without costs.
- Solicitors: *Allen & Son* (for the appellants); *Richardson, Sadler & Co.* (for the respondents).

[Reported by W. K. SCRIVENER, Esq., *Barrister-at-Law.*]

D Re THOMAS, DAVIES v. THOMAS.

[COURT OF APPEAL (MacKinnon, Clauson and Goddard, L.JJ.),
September 4, 1940.]

Practice—Appearance—Appearance out of time—Probate action—Appearance refused by Central Office after certificate of non-appearance issued—Practice of Central Office—R.S.C., Ord. 12, r. 22.

- The defendant to a probate action proposed to enter an appearance out of time, but the appearance was refused by the Central Office in accordance with its practice in probate actions not to allow an appearance to be entered after it has issued a certificate of non-appearance except by leave of the appropriate officer of the division. At the trial counsel for the defendant applied for, and was refused, leave to enter an appearance, the judge considering that the defendant was not a person whom it was necessary for the court to hear, and his attention not being drawn to R.S.C., Ord. 12, r. 22, which allows a defendant to enter an appearance at any time before judgment:—

- HELD: there must be a new trial of the action, and the defendant should be at liberty to enter an appearance.

- [EDITORIAL NOTE. In the King's Bench Division, the record of the proceedings kept on the file will show at once whether any judgment has been given. This, however, is not the case with the Chancery and Probate Divisions. In the Chancery Division the practice has been evolved of obtaining a certificate of non-appearance only after judgment has been given and is about to be drawn up by the Registrar. In the Probate Division the Central Office has no record of the proceedings and, therefore, in practice, an appearance out of time has been refused until an intimation has been received from the proper officer of the division that no judgment has been given. This, though a convenient practice and reasonable for the protection of the Central Office, is in fact directly contrary to R.S.C., Ord. 12, r. 22, and the Court of Appeal suggests that, in due course, steps should be taken to see whether the practice specifically authorised by the rule should not be varied.]

AS TO ENTRY OF APPEARANCE OUT OF TIME, see HALSBURY, Hailsham Edn., Vol. 26, p. 37, para. 55; and FOR CASES, see DIGEST, Practice, p. 380, Nos. 869, 870. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, p. 129.]

APPEAL by the defendant from an order of HENN COLLINS, J., dated Mar. 19, 1940. The facts are fully set out in the judgment of the court delivered by CLAUSON, L.J.

C. R. Warren for the appellant.

H. W. Barnard, K.C., and *N. C. Lloyd-Davies* for the respondents.

CLAUSON, L.J. [delivering the judgment of the court]: This is an appeal from an order of HENN COLLINS, J., in the Probate Division in these terms:

The judge having refused the application of counsel for the defendant to enter an appearance in this cause out of time, and having taken the oral evidence of the witness . . . pronounced for the force and validity of the will.

The defendant apparently entered a *caveat* in the principal Probate Registry in respect of the will of his wife, who had died appointing, I suppose, the plaintiff to be her executor. The effect of his entering that *caveat* in the principal Probate Registry was that it became necessary for the plaintiff, in order to obtain probate, to start an action. The plaintiff duly issued a writ, in respect of which an appearance had to be entered by the defendant in the Central Office. The time for appearance expired without that having been done. It is not necessary to go into the circumstances. The defendant seems to have tried to conduct this matter in person, or with some insufficient assistance, though at a late stage in the proceedings he got in touch with the Poor Persons Department, with the result that he was represented by solicitors and by counsel.

The plaintiff in the action was minded to deal with the matter as inexpensively as possible, and took the proper steps to enable the action to be tried as a short cause. Notice seems to have been given to the defendant that this matter was in progress, and that there would be a trial in the Short Cause List. Thereupon the defendant—I am not sure whether this was before or after he had come into touch with the Poor Persons Department—proceeded to try to enter an appearance. He went to the Central Office and proposed to enter an appearance. The rule which deals with the matter is R.S.C., Ord. 12, r. 22, which provides as follows:

A defendant may appear at any time before judgment.

Accordingly, if one assumes that judgment had not gone in the action, he was entitled to enter an appearance. As a matter of fact, he was told at the Central Office that he could not be allowed to enter an appearance except by leave of the appropriate officer of the Division in which the writ was issued—in this case the Probate Division—and he accordingly failed to enter his appearance. I will say a word or two later in explanation of that. For the moment, I confine myself

A to the facts. A few days afterwards the action came on for trial before HENN COLLINS, J. The defendant's counsel attended, and admitted that he appeared for a defendant who had not entered appearance, and, quite properly, admitted that, strictly, he had no *locus standi*, but he sought to cure that position by asking the judge for leave to enter appearance, notwithstanding that the time had expired, suggesting, as I understand it, that, on the solicitors' undertaking to enter appearance, he, counsel, should be heard. The judge, however, not having had his attention, I think, drawn to R.S.C., Ord. 12, r. 22, did not see his way to make any special order about entry of appearance out of time, and made the order which I have read, which records that he refused the application of counsel for the defendant to enter an appearance, and, as appears from the order, did not hear counsel.

B When this matter came before us, the first point which occurred to us was this. We were unable to appreciate how it was that, when the defendant went to the Central Office to enter his appearance, the appearance was refused, as, *ex hypothesi*, it was before judgment. We looked into the matter, and we found that it is in fact the practice at the Central Office, in the case of an action in any division but the King's Bench Division, not to allow a defendant to enter appearance out of time if a certificate of non-appearance has been issued by the office.

D In order to explain that, I should point this out. At the Central Office, the judgment in an action is recorded. Accordingly, in the King's Bench Division, if a man comes to enter an appearance out of time, the office refer to the file relating to the action, when it appears on the face of it at once whether or not there has been judgment, because, if there has been judgment, a proper entry is made in connection with the action. However, there is no record in the Central Office of judgments in probate actions, or, as I understand, of judgments in chancery actions. It is the practice of the office, in actions in those Divisions, E when an application is made to enter appearance out of time, and a certificate of non-appearance has been issued, to refuse to allow an appearance to be entered without some *fiat* or order or direction of the proper officer of the Division. I suppose that that is the registrar in the Probate Division and the master in the Chancery Division.

F G Not having come across this difficulty before—a difficulty which would apply as much in the Chancery Division as in the Probate Division—we caused further inquiries to be made of the office as to why it is that this difficulty does not arise in the Chancery Division, and I think we have ascertained the reason. In the Chancery Division, H when judgment is being sought in default of appearance, the judge goes into the case, being told by counsel that the defendant is in default in appearance, and gives whatever is the proper judgment, but the plaintiff does not get that order drawn up by the registrar until a certificate of non-appearance is produced to the registrar. As far as our rather summary investigation has gone to-day, I imagine that what in fact

happens in the Chancery Division is that the certificate of non-appearance is not demanded from the Central Office until in fact the judgment has been given, in the sense that the judge has pronounced judgment in court. Then the certificate is obtained, and this difficulty does not arise.

In the Probate Division, or in this particular case, in order to prepare for the judgment—I suppose that this is the practice of the Probate Division—a certificate of non-appearance was obtained before the matter came into court. Therefore, from the point of view of the office, they are put in very considerable difficulty, because, although a defendant has a right to appear out of time, he had no right to appear if there has been a judgment. It does seem a reasonable protection for the office to take—whether or not it is strictly justified by the rules—to direct a man to communicate with the proper officer of the Division in which the action is proceeding, with a view to getting some intimation from that officer that an appearance may properly be entered, notwithstanding that the man is out of time, because there has been no judgment. That accounts for the practice, which startled us rather at first, since it does seem to be in direct contradiction of the rule. However, the difficulty, as I say, seems to arise in practice in the case of probate actions only.

In due course, steps will be taken to see whether the practice should be specifically authorised by the rule, or whether some other practice should be substituted, which should safeguard at once the interests of the plaintiff, who wants to be in a position, if in fact there is no appearance, to get the proper relief, and at the same time safeguard the interests of a defendant who undoubtedly has a right, up to the last moment, to enter appearance before judgment. Proper steps will be taken to investigate that matter. In the present case, we are satisfied that it is not possible for us to allow this order to stand. This is a very small estate, and, judging from the shorthand notes we have before us, it would seem that HENN COLLINS, J., thought that, in the absence of more specific information as to what the defendant's case really was, he was justified in treating the defendant as a person whom it was not necessary for the court to hear. We need say no more than that we do not feel justified in taking the same view. Nor do we think that the judge would have taken that view had his attention been drawn to the right which a man has, without any leave, so far as the rules go, to enter appearance before judgment. Accordingly, in our view, the order of the judge cannot stand and we must direct a new trial of the proceedings.

Counsel on each side, I understand, are prepared to agree that the action should be put into the Short Cause List. Counsel for the defendant has stated orally to counsel for the plaintiff that the ground of opposition to the will is want of due execution, so that there will be no difficulty about that. I should say that the defendant must enter appearance, and I think that, after what has happened, he will find that no difficulty will be put in his way when he approaches the Central Office and asks

to enter appearance. However, any difficulty which does arise can be dealt with.

New trial directed.

Solicitors: *R. I. Lewis & Co.* (for the appellant); *Roberts, Thomas & Co.* (for the respondents).

A

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

WOOD AND ANOTHER v. LONDON COUNTY COUNCIL.

B

[KING'S BENCH DIVISION (Tucker, J.), **September 3, 4, 5, 1940.**]

Factories and Shops—Factory—Kitchen in public institution—Electrical mincing machine—Dangerous machine—Contributory negligence—Factories Act, 1937 (c. 67), ss. 14 (1), 151 (1), (9).

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The plaintiff, who was employed by the defendants at the Bexley Mental Hospital, met with an accident while working an electric mincer in the kitchen of that institution. She was shown how to use both the machine and the plunger for pushing the meat on to the mincing-knife. She put her hand through an aperture in the guard for the purpose of dislodging a piece of meat which had become attached to the side of the hopper. The aperture was of such a size that, while it would be impossible for a man to get his hand through it, it was quite possible for a young girl to get her hand through, and, in the latter case, the guard was an insufficient protection. It was contended that the kitchen of the institution was a factory within the meaning of the Factories Act, 1937, s. 151, in that persons were there employed in manual labour in a process for or incidental to the making or altering of any article, and that this was so although the work was not carried on for trade or for purposes of gain, since the premises were in the occupation of a public authority:—

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HELD: (i) the kitchen was a factory within the Factories Act, 1937, s. 151.

(ii) the machine was a dangerous machine, and was not securely fenced.

(iii) the facts did not disclose any negligence or defect in the system of working.

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(iv) the plaintiff was guilty of contributory negligence, and for that reason the claim failed.

(v) if a case, put into the short non-jury list on the order for directions, is subsequently found to be likely to take longer than stated in the order, it is the duty of the parties to inform the court of this fact, even up to within a day or two of the date of hearing.

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[EDITORIAL NOTE.] The definition of factory in the Factories Act, 1937, is necessarily a wide one, and includes many places which are not ordinarily thought of as factories. The kitchen in the present case is far removed from the ordinary conception of a factory, but it is held to be within the definition section.

AS TO FACTORIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 561-567, paras. 1071-1076; and FOR CASES, see DIGEST, Vol. 24, pp. 897-902, Nos. 1-36.]

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Cases referred to:

(1) *Wilson & Clyde Coal Co., Ltd. v. English*, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406.

(2) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152; [1939] 3 All E.R. 722; Digest Supp.

(3) *Flower v. Ebbw Vale Steel, Iron & Coal Co., Ltd.*, [1934] 2 K.B. 132; Digest Supp.; 103 L.J.K.B. 465; 151 L.T. 87; on appeal, [1936] A.C. 206.

ACTION for damages for personal injuries sustained by the infant plaintiff while working an electrically-operated mincing-machine in the course of her employment by the defendants. The facts are fully set out in the judgment.

C. Paley Scott, K.C., and *S. R. Edgedale* (for *R. O. L. Armstrong-Jones* on war service) for the plaintiff. A

Tristram Beresford, K.C., and *R. T. Monier-Williams* for the defendants.

TUCKER, J. : Since 1936, the plaintiff had been working as a kitchen-maid at the defendants' Avery Hill Training College at Eltham. On Sept. 3, together with some other members of the staff of the training college, she was moved to Bexley Mental Hospital, another institution managed by the defendants. She spent the first few days working in the scullery at Bexley, and was then transferred to the kitchen. On the day in question, when she met with her accident, she was using a mincing-machine, which was an electrically-driven machine connected to an instrument called a Hobart mixer. It is apparently worked on the principle of a motor car. There are three gears, but in this case the machine was permanently working in the second gear. There is also a clutch. When the clutch is disconnected, the mixing-machine ceases to revolve, and the machine can also be stopped altogether by switching off the current. The machine is fed through a hopper. The meat or other material is put through an aperture in a guard which is at the entrance to the hopper. Then it drops a distance of some $\frac{1}{16}$ in. when it comes in contact with what is called the spindle, the revolving screw-like object which conveys the meat to the cutting-knife. B
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The plaintiff had previously had experience of a hand-worked mincing-machine, but she had not had experience of an electrically-driven one. When the plaintiff came to work in the kitchen at about 10 a.m. on the day of the accident, Miss Griffiths, the kitchenmaid who generally did the mincing, was not available. The plaintiff, having no particular duty to do at the moment, asked what she should do. She was told by Miss Gibbard to do some mincing. Miss Gibbard, who is described as a kitchenmaid, has been in the service of the London County Council for over 20 years. She is experienced, and rather differs from one's natural conception of a kitchenmaid—namely, a youthful person doing very subordinate work. She set the plaintiff to do this mincing. Miss Gibbard showed the plaintiff how to work this machine in the sense that she showed her how it switched on and off, and showed her the way to put the meat into the machine. She showed her how to use the plunger. This has been alluded to sometimes in this case as a push-stick, but I do not think that that is a proper description of it. Later on in the case, it was called a plunger, and I think that that is a more appropriate word. It is rather like a rolling-pin, which is thrust through the aperture in the guard, through which F
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the mincer is attained. That aperture, I should have said, is $2\frac{5}{8}$ ins. in diameter. The plunger is so constructed that it forces down the meat or other material till it is in contact with the revolving screw, which conveys it to the mincing-knife, but it is made of such a width that it cannot quite touch the revolving screw.

A The plaintiff was shown how to use that plunger and how to turn the machine on and off, and was shown generally how it worked, and I am satisfied that Miss Gibbard also stayed for a few minutes and watched the plaintiff working the machine and using this plunger for a few minutes on her own.

B After the machine had been worked by the plaintiff for some 10 minutes or so, people nearby heard a scream and found that she had got her right hand into the aperture at the top of the guard through which the meat is fed. Her finger had got caught by one of the revolving blades of the screw. Judging from the plan and from an inspection of the

C machine, and after hearing the expert evidence, I think that it must have got caught at a point at the bottom of the hopper and been drawn by the motion of the screw towards the cutting-knife. The plaintiff received very serious injuries, with the result that, to all intents and purposes, she has lost all the fingers of her right hand. The machine was still

D in motion when she was found in this position. It was then switched off, but had to be taken to pieces before her hand could be extracted from it.

I am satisfied that the accident happened through the plaintiff putting her right hand through this aperture in the guard for the purpose of dislodging a piece of the corned beef which had become attached to the side of the hopper. When one looks at the machine and the plan and the plunger, it is clear from the shape of the plunger that it is quite possible for pieces of meat to become attached to the side of the hopper which cannot be reached by manipulating the plunger through that aperture. The plaintiff says that she tried to detach this piece of meat with the plunger, and that, finding she could not reach it, she put her hand through the opening in the guard for the purpose of dislodging the meat with her finger, that her hand went through the opening too far, and became caught in the revolving screw.

G Miss Gibbard, in instructing the plaintiff, told her expressly that she was not to touch any part of the machine while it was in motion, and that she was not to talk while working it. If anyone came to speak to her, she was to switch it off. It is quite true that Miss Gibbard never in terms gave her any instructions with regard to the precise method of dislodging a piece of corned beef which might become attached to the side of the hopper.

H The plaintiff claims damages under two heads. First, it is said that this kitchen in this London County Council establishment is a factory within the meaning of the Factories Act, 1937, s. 151, and that the machine was not securely fenced in accordance with sect. 114 of that

Act. The first point which arises is whether this kitchen is a factory within the meaning of sect. 151, which provides as follows :

Subject to the provisions of this section, the expression "factory" means any premises in which, or within the close or curtilage or precincts of which, persons are employed in manual labour in any process for or incidental to any of the following purposes, namely :—(a) the making of any article or of part of any article ; or (b) the altering, repairing, ornamenting, finishing, cleaning, or washing, or the breaking up or demolition of any article ; or (c) the adapting for sale of any article ; being premises in which, or within the close or curtilage or precincts of which, the work is carried on by way of trade or for purposes of gain and to or over which the employer of the persons employed therein has the right of access or control : And (whether or not they are factories by reason of the foregoing definition) the expression "factory" also includes the following premises in which persons are employed in manual labour, that is to say. . . .

Then there follow 13 kinds of premises which are expressly stated to be factories whether or not they come within the foregoing definition. In subsect. (9), it is provided as follows :

Any premises belonging to or in the occupation of the Crown or any municipal or other public authority shall not be deemed not to be a factory . . . by reason only that the work carried on thereat is not carried on by way of trade or for purposes of gain.

The result of that seems to be that, whereas in a normal case it is essential that the work being carried on is being carried on by way of trade or for the purpose of gain in order to make the premises a factory, where the premises belong to, or are in the occupation of, a municipal or other public authority, it is not necessary to constitute the premises a factory that the work carried on there is being carried on by way of trade or for the purpose of gain. Therefore, in order to constitute a factory, premises which are in the occupation or ownership of a public authority must be within the earlier words in sect. 151. It seems to me that, in order to decide this case, I have to ascertain whether these premises are premises in which persons are employed in manual labour in any process for, or incidental to, any of the following purposes—namely, (a) the making of any article, or (b) the altering of any article. I can omit (c), which does not apply—namely, the adapting for sale of any article.

It was argued by counsel for the defendants that in any event corned beef is not an article, and it is not an apt description of the process of mincing corned beef to describe it as the making of an article or the altering of an article. I can see no reason why corned beef or slices of corned beef or tins of corned beef should not be called an article, and I think the process of mincing very clearly results in an alteration of the article which is put in the mincer. Therefore, it seems to me that, if I am right in thinking that the effect of subsect. (9) is simply to eliminate the necessity for the work done on these premises being carried on by way of trade or for the purpose of gain, it follows that the joint effect of sect. 151, together with subsect. (9), is that the kitchen in this institution, which deals with some 2,000 patients and a staff of some 300 persons, is a factory.

However, counsel for the defendants also advanced another argument with regard to the proper interpretation of this section which, if I understood it rightly, amounted to this—namely, that some qualification must be put upon subsect. (9) and that the real meaning is that a public authority often carries on certain activities (for example, printing) A which are normally and generally done by persons for the purpose of trade or gain, and that the object of this section was to bring within the scope of the Act municipal activities of that kind. That is to say, where a local authority is carrying on some process which people ordinarily do for the purpose of gain or trade, they shall not escape the consequences of the Factories Act, 1937, merely because they are not doing it by way of trade or for the purpose of gain. He says that that does not apply to an operation like preparing food in a kitchen.

The difficulty I feel about that argument is that preparing and altering articles of food in a kitchen may very often be done for the purpose of C trade or gain other than merely adapting articles for sale over the counter of a retail shop. It seems to me that mincing and preparing articles of food for consumption is an operation which, in some circumstances, is carried on for the purpose of trade or gain, and that, consequently, the premises at which these operations are so carried on come D within sect. 151, but the requirement that the work shall be done for the purpose of trade or gain does not apply to a municipal or other public authority. I am unable to give to this subsection any interpretation other than that this kitchen comes within the definition of a factory, however unreal that may appear.

E If that kitchen was a factory, was this machine securely fenced within sect. 14, which provides as follows :

(1) Every dangerous part of any machinery . . . shall be securely fenced unless it is in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced . . .

F A fence or guard was provided for this machine, and I am satisfied that this revolving screw which draws the material to the cutting-knives is a dangerous part of the machine, and, therefore, one which requires to be fenced, as it in fact was fenced in this case. The question is whether it was securely fenced, and, if it was not, G whether it was in such a position or of such construction as to be as safe to every person employed or working on the premises as it would be if securely fenced. The aperture through which the machine is fed is, as I have said, 2½ ins. in diameter. The plaintiff put her hand through this aperture in order to show me, and she got her left hand, H which, of course, is the only useful hand she now has, through without any real difficulty at all. She had to force it a little at the broadest part, but it required no great amount of force, and really she was able to get her hand through quite easily. No doubt the aperture would be sufficient to protect the hand of an ordinary man working such a machine, but, in my view, it was not sufficient for the protection of girls working

on a machine of this kind. There is nothing abnormal about this plaintiff's hand. She has rather long fingers, but her hand is quite an average hand for a girl of 19 years of age, which was her age at the time of the accident. In my view, the guard was not sufficient for the purpose for which guards are intended—namely, as far as possible to prevent the hands of people working on the machine from coming into contact with the dangerous part—it was not sufficient in the case of young girls, and, therefore, the machine was not securely fenced, or as safe as it would be if it had been securely fenced. A

To my mind, this is not the case of a machine where it is not commercially practicable securely to fence it and at the same time use the machine. The evidence given in this case is that, if the aperture had been some $2\frac{1}{4}$ ins. in diameter, the machine would have been perfectly safe for use by an ordinary girl. That was not really disputed by the expert called by the defendants, and I have had no evidence put before me to show that an aperture of $2\frac{1}{4}$ ins. in diameter or thereabouts would have made this machine of no practical use for the purpose for which it was required—namely, the preparation of food, meat and vegetables. B C

I have accordingly come to the conclusion that the plaintiff has established (i) that this kitchen is a factory, (ii) that the part of the machine with which the plaintiff's hand came in contact was a dangerous part of the machine, and (iii) that it was not securely fenced. The defendants, however, say that, even so, this accident was caused, or contributed to, by the negligence of the plaintiff herself. Before dealing with that, which, in my view, is by far the most difficult part of the case, I will deal quite shortly with another head of claim, which is independent of the Factories Act, 1937. The statement of claim alleges as follows : D E

The defendants carried on at their said factory a negligent system of work and/or supervision.

The plaintiff was asked for particulars of that allegation, and the answer is contained in a letter of Aug. 14, 1940, as follows : F

Improper and unsuitable implements were provided, no proper supervision took place, and the plaintiff repeats the particulars under para. 2.

The particulars under para. 2 were as follows : G

Providing a dangerous machine, failing to provide a suitable push-stick, failing to give the plaintiff any, or any sufficient, instruction in the use of the said machine, failing to give any, or any sufficient, warning to the plaintiff of the danger of this machine, failing to provide any fence or guard or other similar protection. H

I think that the particulars in the paragraph which are applicable to the alleged faulty system are "failing to give the plaintiff any, or any sufficient, instruction," and "failing to give any, or any sufficient, warning." Really, I think those are the allegations which are relied upon under that head with regard to a faulty system. This allegation of a faulty system has now become commonplace in every case brought under the Factories Act, 1937, since the decision in the House of Lords

in *Wilsons & Clyde Coal Co., Ltd. v. English* (1), and I think that, when an allegation of that kind is made, it is necessary that it should be made very precisely, stating in what way the system is a negligent one.

A In substance, the allegation here is that the system with regard to the instruction and warning of employees is negligent and defective. The system was, as I find, that girls employed in the kitchen should not be put on one of these mechanical mincers until they had been there for a week, and that, having been there for a week, and presumably having been found to be of sufficient intelligence to work a machine of this kind, they were not then put on to it until they had been instructed B in the working of the machine by a person of experience—namely, Miss Vidal, the superintendent, or Miss Brown, her assistant, or, where they are unavailable or too busy, a person in the position of Miss Gibbard, who, though described as a kitchenmaid, has been employed by the, county council for some 20 years or more. I do not think that that C can possibly be said to be a negligent system. It is quite true that the individual persons whose duty it is to carry out that system may do it badly or negligently, but, that being the system, I am quite unable to say that there is any negligence or defect about it.

D I pass to the defence of contributory negligence. The onus is on the defendants to establish such an allegation. The plaintiff was 19 years of age at the time. I have seen her, and she struck me as being of quite average intelligence, and as not being young for her age. Some girls of 19 appear to be little more than children. She did not appear to me to be that kind of girl. Admittedly she was a novice at the E working of a mechanical mincer—that is to say, she was operating it for the first time—but she had obviously worked a hand-mincer, and she appreciated the nature of the machine. This machine was operated by electricity. That was pointed out to her when it was switched on and off. She was told not to touch the machine when it was in motion. F These instructions have been criticised, and it is said that she was not told in terms not to put her hand through the aperture. I think that, if an ordinarily intelligent person is told not to touch a machine while it is in motion, it follows that those instructions must necessarily include the instruction not to put her hand into it.

G The plaintiff says that she performed this operation without thinking of the possible consequences, and it is said that that is a thoughtless action, which is negligent. That, no doubt, is true. The test has been laid down in *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (2), in a passage approving these words of LAWRENCE, J., in *Flower v. Ebbw H Vale Steel, Iron & Coal Co., Ltd.* (3), at p. 140 :

... in considering whether an ordinary prudent workman would have taken more care than the insured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.

I have no doubt that it would be equally true to say that it is not every

risky thing which an inexperienced girl may do in a factory when she is first operating a machine which ought to be held to amount to contributory negligence. I have no doubt that inexperience may account for some acts, in the same way as great familiarity may account for other acts, and may excuse them from being held to be negligent.

None the less, having been invited by counsel for the plaintiff to take a realistic view of this case, I find it quite impossible to come to any conclusion other than that the plaintiff was guilty of contributory negligence. I think that I should be taking an unreal view of the facts if I said that an ordinary prudent kitchenmaid, situated in the circumstances in which the plaintiff was situated, having had that degree of instruction and warning which the plaintiff had had, was not guilty of contributory negligence in putting her hand through an aperture of this kind for the purpose of dislodging a piece of meat from the side of the machine when she knew, or must have known if she had applied her mind to it at all, that the machine was in motion, and that it was a dangerous operation to carry out. In those circumstances, applying the view laid down in *Caswell's* case (2), I feel driven to the conclusion that the plaintiff is not entitled to recover on the ground that she was guilty of contributory negligence.

Before passing from this case, I desire to draw attention to R.S.C., Ord. 36, r. 29 (6), which provides as follows :

It shall be the duty of all parties to any cause or matter entered in any of the said lists to furnish without delay to the officer by whom the list is kept all available information relating to any settlement, or likelihood of settlement, of the cause or matter, or affecting the estimated length of the trial.

The estimated length of the trial in this case when the order for directions was made was 4 hours, and it was accordingly put into the short non-jury list. Solicitors should remember that their duties to the court do not cease when the order for directions is made, and that, under this order, it is their duty to inform the court at any moment, right up to within a day or so of the hearing of the action, of any matter which affects the estimated length. If they are satisfied at a later date that the estimated time given when the order for directions was made was erroneous, the matter must be put right at any stage right up to within a day or so of the trial. Otherwise, it is quite impossible for there to be any degree of efficiency in the management and manipulation of the list. There must be judgment for the defendants with costs, but I think that it is right that I should assess the damages in case of an appeal, and I assess them at £850.

Judgment for the defendants with costs.

Solicitors : *W. H. Thompson* (for the plaintiff) ; *J. R. Howard Roberts* (for the defendants).

[Reported by D. K. BELCHER, Barrister-at-Law.]

MEYER v. LOUIS DREYFUS ET CIE.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.J.J.),
September 24, 1940.]

Practice—Writ—Service—Substituted service—Partnership with head office in enemy-occupied territory—Service on manager of London office—R.S.C., Ord. 48A, r. 3.

The plaintiff brought action against the defendants, a partnership firm carrying on business in Paris. On June 15, 1940, Paris was captured by the Germans and became enemy-occupied territory. The firm had a branch in London carried on by a manager under a power of attorney in wide terms. The Board of Trade had issued a licence to the manager and his successors to carry on the business, but no vesting order had been made. The writ was issued on June 22, 1940, and was served on the manager on June 28 in pursuance of R.S.C., Ord. 48A, r. 3. On July 4, a conditional appearance was entered on behalf of the four partners who constituted the firm:—

HELD: in the circumstances of the case, the service of the writ was a good service within the terms of R.S.C., Ord. 48A, r. 3, and it should be ordered that the appearance should stand as unconditional.

[EDITORIAL NOTE.] The real difficulty in the way of a British subject suing an enemy is one of service. In the present case, where the business is a partnership one and is being carried on in England by a manager, service can, under the rules of court, be effected upon the manager, and the difficulty, therefore, disappears.

AS TO SUBSTITUTED SERVICE, see HALSBURY, Hailsham Edn., Vol. 26, pp. 29, 30, paras. 42, 43; and FOR CASES, see DIGEST, Practice, pp. 331-334, Nos. 491-514. SEE ALSO YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 872-874.]

Cases referred to:

- (1) *Porter v. Freudenberg, Kreglinger v. Samuel (S.) & Rosenfeld, Re Merten's Patents*, [1915] 1 K.B. 857; 2 Digest 160, 302; 84 L.T.K.B. 1001; 112 L.T. 313.
- (2) *Re Deutsche Bank (London Agency)*, [1921] 2 Ch. 291; Digest Supp.; 90 L.J.Ch. 449; 126 L.T. 20.
- (3) *Stevenson (Hugh) & Sons, Ltd. v. Akt. für Cartonnagen-Industrie*, [1917] 1 K.B. 842; 1 Digest 693, 3028; 86 L.J.K.B. 516; 115 L.T. 594.
- (4) *Tingley v. Müller*, [1917] 2 Ch. 144; 1 Digest 694, 3029; 86 L.J.Ch. 625; 116 L.T. 482.

INTERLOCUTORY APPEAL from an order of WROTTESLEY, J., dated Aug. 5, 1940. The plaintiff sued a firm carrying on business in England, the head office of the firm being in Paris. On June 15, 1940, Paris was captured by the Germans and became enemy-occupied territory. Service was effected upon the manager of the London branch and a conditional appearance was entered. The defendants' manager then moved to set aside the writ, on the ground that the defendants were not carrying on business in England owing to their having become enemies by reason of the German occupation of Paris, and that, by reason thereof, all the authority of the persons acting for the firm in London had gone. The business itself, however, still continued to be carried on in England. The plaintiff was employed by the defendants and had occupied a responsible position for many years before the war. He had been in the habit of leaving with the defendants a part of his

salary upon which they paid interest. This action was to recover the amount standing to the credit of the plaintiff. The defendants' London office had been managed by two managers named Gamburg and Rowland. Rowland died in 1939, and thereafter the London office was managed solely by Gamburg. He died on July 5, 1940, which is after any date material to this case. Gamburg managed the London office under a power of attorney drawn in very wide terms, and giving power to Gamburg to appoint substitutes. Under its terms Gamburg appointed as substitute one Strass. The writ in the present case was issued on June 22, 1940, and was served upon Gamburg on June 28, 1940. On July 4, 1940, conditional appearance was entered on behalf of the four partners who constitute the defendant firm. On the following day, Gamburg died. On July 11, 1940, a summons was taken out to set aside the writ and the service. MASTER MOSELEY dismissed the summons, but his order was reversed by WROTTESELEY, J., and this appeal was brought by leave of the judge. The question was whether the service of the writ was a good service, having regard to the events which have taken place. The Board of Trade had issued a licence to Gamburg and his successors to carry on the business, but no vesting order had been made. The Board of Trade had stated that the defendants were at liberty to enter a defence.

Sir Robert Aske, K.C., and D. A. Scott Cairns for the appellant.

Cyril T. Miller for the respondents.

Aske, K.C.: The object of R.S.C., Ord. 48A, r. 3, is to meet a case in which there is some difficulty in serving the partners. It is unnecessary to serve any of the partners personally in a case where the firm is carrying on business. It is sufficient to serve a writ upon the person in control of the business. For the purpose of service, the rule visualises the firm as something different from the partners. If the writ is served upon the manager, execution can be levied only upon the assets of the partnership. In order to enforce the judgment against any of the individual partners, the leave of the court must be obtained and the writ must be served upon the partners. They therefore have an opportunity of putting forward any defence they may have before their private property may be touched. In the present case, every requirement of R.S.C., Ord. 48A, r. 3, has been satisfied. It was established by *Re Deutsche Bank (London Agency)* (2) that a person resident in a country part of which is in enemy occupation does not become an enemy alien even though he is residing in the part of the country which is in enemy occupation. At common law, the defendants are not enemy aliens, and the power of attorney given to Gamburg has not been affected. The business which is being carried on in this country is the defendants' business. Even if the Trading with the Enemy Act, 1939, has any application, there is no adequate evidence as to where the partners actually are. [Counsel referred to *Porter v. Freudenberg* (1).]

Miller: The defendants' business is one of national importance. In

the present case, the court must be satisfied that service upon Gamburg would be likely to be brought to the notice of the firm. In *Porter v. Freudenberg* (1), the court was apparently satisfied. If this is a debt incurred by the defendants in Paris, leave cannot be obtained to serve out of the jurisdiction because the matter would fall under R.S.C., Ord. 11. If it be correct that, when the defendant firm became an enemy partnership, all authority of Gamburg came to an end, the custodian could not revive the authority which had been destroyed. Any agency between Gamburg and his principals would have been dissolved by his principals becoming enemy aliens. The authority of Gamburg having gone, it cannot be revived. [Counsel referred to *Stevenson & Sons, Ltd. v. Akt. für Cartonnagen-Industrie* (3) and *Tingley v. Müller* (4).]

C MACKINNON, L.J.: This is an appeal from a decision of WROTTESELEY, J., by which he set aside the service of a writ. The writ was issued against the well-known firm of Louis Dreyfus et Cie. R.S.C., Ord. 48A, r. 1, provides :

Any two or more persons claiming or being liable as co-partners and carrying on business within the jurisdiction may sue or be sued in the name of the respective firms . . .

D By rule 3 it is provided :

Where persons are sued as partners in the name of their firm under r. 1, the writ shall be served either upon any one or more of the partners or at the principal place, within the jurisdiction, of the business of the partnership upon any person having at the time of service the control or management of the partnership business there . . .

E This writ was served upon one Gamburg at the London office of the French firm, he being, under a power of attorney, in control as manager of the partnership business. The service would appear to be in complete compliance with the terms of R.S.C., Ord. 48A, r. 3. However, counsel for the respondents persuaded WROTTESELEY, J., to set aside that service, and to hold that r. 3 did not apply, upon an argument which he has repeated to us, that Gamburg was not in control of the partnership business. His principal contention is that Gamburg was not in control of the partnership business because his authority as an agent for the partners was terminated when they became aliens by the German occupation of Paris. The truth is that Gamburg and his successors were allowed by the Custodian of Enemy Property, pursuant to the Trading with the Enemy Act, 1939, to continue this business. I am quite satisfied that in these circumstances the person sued was carrying on the business of the partnership, and had control of the partnership business of the defendants, and that, therefore, the service of the writ upon the defendant firm under R.S.C., Ord. 48A, r. 3, was perfectly properly effected under r. 3.

H It is to be noticed that this is a pure technicality. It was laid down in the last war that a person who is in effect an enemy, or who has technically become an enemy, may yet be sued by an English subject

in respect of a cause of action vested in that subject, subject to the difficulties of service. In *Porter v. Freudenberg* (1), R.S.C., Ord. 48A, r.3, did not come into question, because the parties were individuals and not a partnership. There it was held [p. 858]:

Where an action is brought against an alien enemy resident in the enemy's country, who carries on a branch business in this country by means of an agent, leave may be given to the plaintiff to issue a concurrent writ and to make substituted service of a notice of the writ by service of the notice upon the defendant's agent in this country.

If the defendants here had been an individual and not a firm, the service of a concurrent writ on Gamburg would have been perfectly proper, and, on the authority of *Porter v. Freudenberg* (1), the initiation of these proceedings would have given to the plaintiff the right to come to the court. The alternative method under R.S.C., Ord. 48A, which is here available is equally applicable by service upon the manager of a partnership business. I observe that it is noticeable that that alternative method would obviously have been adopted in *Porter v. Freudenberg* (1), because in one of the cases there concerned, namely, *Kreglinger v. Samuel & Rosenfeld* (1) the service of the original writ was under R.S.C., Ord. 48A, r. 3. The manager entered a conditional appearance, and applied to set aside the service, and the judge in chambers set it aside, on the ground, not that the manager had no authority and was not carrying on the principal's business, but that the sole proprietor of the business was an individual named Cohen and, therefore, that R.S.C., Ord. 48A, r. 3, did not apply. Therefore, he adopted and directed the alternative method of concurrent writs served upon the manager, a course which was approved by the Court of Appeal.

In this case, R.S.C., Ord. 48A, does apply, because the defendants were a partnership and not an individual, and one need not go through the machinery of the concurrent writ, but can effect service, as has been done, under R.S.C., Ord. 48A, r. 3. It seems to me that the service here is a perfectly good service, and the contention that this manager was not carrying on the business of the partnership by reason of the operation of the common law about trading with the enemy does not apply when the manager is carrying on the business with the licence of the Crown, as delivered to him by the Board of Trade or its officer.

In the result, I think that the service of the writ in this case was perfectly right, and that this appeal should be allowed.

GODDARD, L.J. : I agree, and I do not think that it is necessary to add anything.

DU PARCQ, L.J. : I agree, and I have nothing to add.

Appeal allowed with costs in both courts. Order that appearance stand as unconditional.

Solicitors : *Dehn & Lauderdale* (for the appellant) ; *Richards, Butler & Co.* (for the respondents).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.]

Re ORAM, ORAM AND ANOTHER v. ORAM AND OTHERS.

[CHANCERY DIVISION (Bennett, J.), July 11, August 15, 1940.]

Executors and Administrators—Residuary estate—Valuation—Date for valuing estate for purpose of final distribution.

A The testator gave directions in his will for the sale and conversion of his real and personal residuary estate, with a power to postpone conversion, and by cl. 18 of his will he gave his residuary estate, after payment of funeral and testamentary expenses, debts and legacies and so forth, "upon trust to divide the same into two parts in such a way that the value of one part shall exceed the value of the other part by exactly £30,000." The smaller share was given to A. E. O. absolutely, and the larger share was settled on trust. The testator died in 1937, and between July 16, 1938, and Jan. 18, 1939, certain investments had from time to time been transferred to the settled share, and on the same dates the trustees of the will had transferred to A. E. O. the same nominal amount of the same investments. The trustees wished to make a final distribution of the residuary estate, which consisted of a sum in cash and certain investments, the latter having substantially depreciated in value since the testator's death. The court was asked to decide whether the valuation for the purpose of distribution should be made as at the testator's death or at the date of distribution :—

D HELD : there being no directions in the will as to the date of distribution, the general rules of administration applied, and the valuation should be made as at the date of the testator's death.

[EDITORIAL NOTE. If the will contains any indication of the date at which the estate is to be valued for the purpose of distribution, then the matter is one of the construction of the will. Where there is no such indication, then the matter is purely one of the application of the general rule applied by the court in such a case. It was sought to distinguish the present case from *Re Gunther's Will Trusts*, E *Alexander v. Gunther* (1) by reason of the absence in the present case of a hotchpot clause, but it is held that no such distinction can be made.

AS TO RESIDUARY ESTATE, see HALSBURY, Hailsham Edn., Vol. 14, pp. 366-368, paras. 685-688 ; and FOR CASES, see DIGEST, Vol. 23, pp. 459-464, Nos. 5328-5357.]

F Cases referred to :

- (1) *Re Gunther's Will Trusts*, *Alexander v. Gunther*, [1939] Ch. 985 ; [1939] 3 All E.R. 291 ; Digest Supp. ; 108 L.J.Ch. 395 ; 161 L.T. 156.
- (2) *Re Wills, Dulverton v. Macleod*, [1939] Ch. 705 ; [1939] 2 All E.R. 755 ; Digest Supp. ; 108 L.J.Ch. 286 ; 160 L.T. 635.
- (3) *Re Hargreaves*, *Hargreaves v. Hargreaves* (1903), 88 L.T. 100 ; 44 Digest 1248, 10767.
- G (4) *Barnardo's Homes v. Income Tax Special Comrs.*, [1921] 2 A.C. 1 ; 23 Digest 394, 4653 ; 90 L.J.K.B. 545 ; 125 L.T. 250 ; *sub nom. R. v. Income Tax Acts Special Purposes Comrs.*, *Ex p. Barnardo's Homes National Incorporated Assocn.*, 7 Tax Cas. 646.

H ADJOURNED SUMMONS to determine at what date the valuation of the residuary estate given by the will of Arthur Oram, dated Nov. 2, 1934, should be made for the purpose of distribution. The facts are fully set out in the judgment.

A. Andrewes Uthwatt for the plaintiffs, the trustees.

Wilfrid M. Hunt for Alfred Oram, a son of the testator, the first defendant.

H. Hillaby for Briseis Elizabeth Oram, a daughter of the testator, the second defendant.

C. D. Myles for Josephine Groom, another daughter of the testator, the third defendant.

Roger W. Turnbull for Daniel Oram, a son of the testator, the fourth defendant.

J. L. Stone for Arthur Bryan Oram and Briseis Elizabeth Geraldine Oram, infants, the fifth and sixth defendants.

Uthwatt stated the facts.

Hunt: By cl. 18 of his will, the testator gives two shares, one to be exactly £30,000 more than the other. They are given at the death, and, for purposes of distribution, they should be calculated as from the death. It is fairer to the smaller share. *Re Gunther's Will Trusts, Alexander v. Gunther* (1) was decided on that footing, but there is no decided case actually on all fours with this case. There is *Re Wills, Dulverton v. Macleod* (2), which overlaps with *Gunther's* case (1). In *Re Hargreaves, Hargreaves v. Hargreaves* (3), the interest was calculated down to the date of distribution, and not at the death. Here, however, the case for valuation as at the death is stronger. In this case, there is no hotchpot clause.

Hillaby: The shares should be reckoned at the date of distribution. *Gunther's* case (1) is not on all fours with this case. The correct date for valuation is the date when the money is to be distributed and the residuary moneys have been got in, as directed by the will. *Gunther's* case (1) is distinguishable by reason of the hotchpot clause. This is a point of construction.

Stone referred to *Barnardo's Homes v. Income Tax Special Comrs.* (4).

BENNETT, J.: The testator died on Mar. 12, 1937, and probate of his will, dated Nov. 2, 1934, was granted on June 21, 1937. The net value of his personal estate was sworn at £412,755. By cl. 6 of his will, he gave a number of pecuniary legacies exceeding £15,000 in amount. By cl. 7, he gave to his trustees the sum of £10,000, upon trust to invest the same in securities authorised by law for the investment of trust funds, and settled that sum and the investments representing it upon a granddaughter, her husband and her children. By cl. 8, he gave his trustees a sum of £24,000 upon trust to invest the same in like investments, and settled that sum upon a daughter and her children. By cl. 9, he settled £40,000 to be invested in the like investments upon another daughter. By cl. 10, he directed his trustees to pay to his wife a sum of £1,000, and also to pay to some named trustees for his wife the sum of £36,000, or to transfer to them investments, authorised by

law for the investment of trust funds, of equal value as certified for the purposes of probate. By cl. 13, he directed his trustees to raise or set aside out of his residuary estate within 12 calendar months after his decease such sum, not exceeding £5,000, as they should in their absolute discretion think fit, and to apply the same in the purchase in fee simple
A in possession free from incumbrances of a freehold dwelling-house to be used as a residence for his wife during her life. Clauses 14, 15 and 16 declared the trusts upon which such dwelling-house, if purchased, was to be held.

Clause 17 contains a demise and bequest of all the testator's real and
B personal estate upon trust to sell the real estate and to sell, call in and convert into money so much of his personal estate as should not consist of money, with a power to postpone for so long as his trustees should think fit the sale, calling in and conversion of any part of his real and personal estate. The clause also contains a declaration that the income
C of his personal estate shall from his death be treated as income. Clause 18 of the testator's will is as follows :

I declare that my trustees shall out of the proceeds of the sale, calling in and conversion of my said real and personal estate and out of my ready money pay my funeral and testamentary expenses and debts and the legacies hereby or by any codicil hereto bequeathed and the duties directed by this my will to be paid
D out of my residuary estate and shall stand possessed of the residue of such moneys (hereinafter called "the trust premises" which expression shall include any unsold real estate or unconverted personalty) upon trust to divide the same into two parts in such a way that the value of one part shall exceed the value of the other part by exactly £30,000

By cl. 19, the trustees are to hold the smaller of the two parts in trust
E for the testator's son, the defendant Alfred Ernest Oram, absolutely.

By cl. 20, the trustees are directed to hold the larger part in trust to pay the net annual income accruing to one equal half part thereof from and after the day of his death to the widow of his late son Daniel John Oram, and, subject to that trust, to hold that larger part, as well
F the capital as the income thereof, upon trust for the benefit of the child or children of his son Daniel John Oram. These are all the relevant provisions of the will.

The relevant facts are as follows. All the testator's debts and liabilities, and all duties payable by reason of his death, other than legacy duty
G falling due on shares of residue, have been paid. All the legacies given by the will have been paid or satisfied. A freehold dwelling-house has been bought under the power contained in cl. 13 of the will.

On various dates between July 16, 1938, and Jan. 18, 1939, the plaintiffs, as trustees of the testator's will, appropriated to the settled
H share of residue investments which, at the respective dates of appropriation, had a book value of £35,812 7s. 1d. On the same dates, the plaintiffs transferred to Arthur Oram the same nominal amount of the same investments. The plaintiffs are now in a position finally to divide

the testator's residuary estate. This now consists of a number of investments in the stock or shares of companies, most of which are quoted on the stock exchanges, and a sum of £8,140 2s. 7d. in cash. On Aug. 16, 1939, the investments had a book value of £100,604 3s. 2d. There has been a substantial depreciation in the value of these investments since the testator's death, the ascertained depreciation at Mar. 12, 1939, amounting to £18,125 5s. 9d. The plaintiffs have it in mind finally to divide the testator's residuary estate by appropriating to each share investments comprised in the estate. Some investments and real estate sold in the course of administration produced nearly £3,000 less than the value put upon them for the purposes of estate duty.

On these facts, the plaintiffs ask the following questions :

To have it determined whether for the purposes of dividing the capital of the residuary estate of the testator into two parts as directed by cl. 18 of the said will the executors should proceed upon the basis of (a) the value of the residuary estate at the date of distribution and attributing to the larger part investments and cash which on the basis of the values at the date of distribution exceed investments and cash attributed to the smaller part by £30,000 ; or (b) the value of the residuary estate of the testator as at the date of the testator's death and dividing the assets to be distributed between the larger share and the smaller share in the proportions borne by one moiety of such value plus the sum of £15,000 to one moiety of such value less the sum of £15,000.

It will be noticed that the testator died more than 3 years ago. No explanation is given as to why so long a period elapsed before the plaintiffs were in a position to make the final division of the testator's estate, but no one has complained, and so I assume that there has been good reason for the delay. Primarily, of course, the answer to the question depends upon whether the testator in his will has given his trustees any directions as to when any valuation has to be made. If he has, his directions will prevail over any general rule of administration. In this will, there are not, in my judgment, any directions on this point. Clause 17 imposes a trust for conversion upon all the testator's property, and in cl. 18 the testator declares that, out of the proceeds of conversion, his trustees are to pay his funeral and testamentary expenses and debts and legacies and the duties directed to be paid out of his residuary estate, and that they are to stand possessed of the residue of such moneys upon trust to divide the same into two parts in such a way that the value of one part shall exceed the value of the other by exactly £30,000. This language points to a division of money, an operation into which no question of values enters. However, in cl. 18 the testator says that the residues of such moneys are to be called "the trust premises," and also says that that expression shall include any unsold real or unconverted personal estate, and the language of the final trust in cl. 18 is to be noted. The value of one part is to exceed the value of the other part by exactly £30,000. The question, of course, is : When ? The will, in my judgment, neither expressly nor impliedly

gives any directions in that respect. Therefore, the general rule of administration, if there be one, must be applied.

Almost the exact point came before FARWELL, J., in *Re Gunther's Will Trusts* (1). That was a case in which the judge reserved his judgment before pronouncing his decision. The headnote of the case as reported in the LAW REPORTS is as follows :

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A testator, having bequeathed his residuary estate to trustees on trust for sale and conversion with power to postpone sale, directed the moneys to arise therefrom to be divided into moieties to be held respectively on certain trusts for the children of his first marriage and their issue and for the children of his second marriage and their issue. He further directed that in the division of the estate certain sums should be brought into hotchpot :—HELD : (i) that, there being nothing in the will to indicate that the testator had in mind any date at which the estate should be valued for the purpose of adjusting the rights of the parties *inter se*, the matter must be considered at large ; (ii) that inasmuch as the rights of the parties might vary according to the date selected and it was desirable that it should not be one dependent on the energies of the executors, the valuation should be made as at the death of the testator.

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In the will of that testator there was a trust for conversion and a direction out of the proceeds to pay debts, funeral and testamentary expenses and legacies, and then to divide the residue into two equal moieties. Trusts were then declared of each moiety, and there were directions that in the division certain sums were to be brought into hotchpot against each moiety by the persons taking interests in such moiety.

The same principle must be applied in ascertaining the date when, in such a case, the valuation for the purpose of division of that testator's estate had to be made and the date when, for the same purpose, a valuation has to be made of the testator's estate. There are three passages from the judgment of FARWELL, J., that I must read. The first is as follows, at pp. 989, 990 ([1939] 3 All E.R., at pp. 294, 295) :

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There does not appear to be any reported case in which this question has been decided. It, therefore, falls to me to consider the way in which the matter should be dealt with. A question of this sort must be primarily one of the construction of the particular will in each case ; that is to say, the court must look at the will and see whether there is anything in it which indicates that the testator intended the valuation to be made at any particular time. There may be provisions in the will which, although not expressly stating any particular date, point to a conclusion as to what the testator did intend. But in the present case I am unable to find anything in the will which is sufficient ground for saying that the testator contemplated any particular date. There is nothing in the will which I can say indicates that he had some particular date in his mind. I have, therefore, to consider, as it were, at large, what is the appropriate date.

Then later the judge says, at p. 991 ([1939] 3 All E.R., at pp. 295, 296) :

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I have been referred to a considerable number of authorities in which this sort of question has arisen with regard to the interim distribution of income, and the amounts to be brought in for that purpose, but in my judgment those cases do not assist me in coming to a conclusion in this matter. This is a question of the date to be taken for the purpose of valuing the capital of the estate. Other considerations may arise when the court is dealing with income and not with capital. In those circumstances, it seems to me that I have to determine this point without the assistance of any decided case at all.

Later, the judge states the reasons for his decision as follows, at pp. 991, 992 ([1939] 3 All E.R., at pp. 295, 296) :

The three dates which have been suggested are, the date of the death of the testator, the date of retainer, and the date of distribution. Having regard to the fact that, if a date other than that of the death is taken, it must depend to some extent upon the individual executors, it seems to me desirable, if possible, to take one which is not so dependent. I am not suggesting—I have no reason to suggest—in this particular case that there has been any undue delay in the administration of the estate, which was a large and complicated one, and it may well be that the matter could not have been dealt with and disposed of more quickly. But there may be cases in which the administration is delayed because the executors have not exerted themselves as they might have done, and are dilatory in their duties, with the result that the date for distribution may be postponed and by the postponing of the date some of the beneficiaries may benefit and some may suffer. That is a position which, in my view, is not a desirable one, if it can be avoided.

I read that case as one in which the judge was laying down a general rule of administration to be applied to the estate of a deceased person, which estate was distributable upon death, and in which, for the purposes of distribution, and only for the purposes of distribution, a valuation of the property comprised in the estate had to be made. I am bound, I think, to follow that decision, unless I am satisfied that the rule which FARWELL, J., laid down is inconsistent with an established rule of administration generally applied by this division of the court.

It was argued that the rule laid down was inconsistent with established rules, and in particular that it was inconsistent with the decision of SIMONDS, J., in *Re Wills, Dulverton v. Macleod* (2). In that case, SIMONDS, J., was considering which of two well-known modes of adjusting the rights of advanced beneficiaries to participate in income accrued between the date of a death and the date of a distribution of capital he should adopt. One well-known method is to value the property comprised in the estate at the date of distribution and to add to that value for the purposes of computation the total of the sums advanced. The sum so arrived at is divided into shares, and the advances are deducted from the advanced shares. The accrued income is then divided into shares which bear to one another the same relative proportions as do the shares so ascertained in the estate which is to be distributed. The other method is to defer valuation until the time of actual distribution. When that time arrives, there is added, for the purposes of computation, to the actual income of the estate interest at the rate of 4 per cent. per annum on the amount of the advances. The sum so arrived at is divided into the required number of shares, and the shares of those persons who have been advanced are debited with interest at the rate of 4 per cent. per annum on their advances.

There is some conflict of authorities as to which of these two methods is the method to be applied in cases in which there is no express direction on the matter in the testator's will. SIMONDS, J., decided that the

sound method was in accordance with the general rule. I will read the headnote of *Re Wills, Dulverton v. Macleod* (2), which accurately summarises the essential facts and correctly states the decision :

A A testator by his will gave his residuary real and personal estate to his trustees upon trust as to two equal fifth shares to pay the income thereof to his widow during her life, and after her death to hold the same upon the same trusts as those declared concerning the capital and income of the remaining three-fifths, which were for division among his children who should attain the age of 25 years or marry and if more than one in equal shares, except that each of his sons was to take three times as much as each of his daughters, and the daughters' shares were settled upon them and their issue. The will contained a hotchpot clause in a common form by which the testator declared that all sums of money and investments and property which he had given or covenanted to give for the benefit of any child or his or her wife or husband or issue over £500 at any one time, should be taken in and towards satisfaction of the share of such child in his residuary estate and should be brought into hotchpot and accounted for accordingly. The testator, who left a very large estate, died in 1927, leaving his widow and 5 children, all then infants, surviving him. His eldest child attained the age of 25 in 1938, and shortly afterwards married. The estate consisted mainly of securities the value of which was quoted on the principal stock exchanges. The testator during C his life had settled property and investments of considerable but varying amounts upon each of his 5 children. The trustees took out this summons to determine (*inter alia*) how the income and accumulations of income ought to be apportioned among the children, having regard to the hotchpot clause :—HELD : that interest at the rate of 4 per cent. per annum less tax on the capital sums to be brought into hotchpot ought to be added to the actual income of three-fifths of the estate as from the death of the testator, and the aggregate amount of income so arrived at divided into shares (each son's share being three times each daughter's) and credited to the respective children subject in each case to the deduction of interest D on the capital sums to be brought into hotchpot, in accordance with the general rule of administration of the court.

I think that in that case it must have followed from the decision as to income that, when the trustees made appropriations of capital to the E shares of the testator's children who had attained vested interests, they valued the investments comprised in the estate at the date of appropriation, and not at the date of death.

However, the present case seems to me to differ from *Re Wills* (2) in that, in the present case, the testator's estate was distributable at his F death. In *Re Wills* (2), the interests which became distributable were not vested at the death of the testator, but were contingent, and there was a long interval of time between death and distribution, due to the provisions of the will. It may well be that, in a case where the provisions of a will are such that there must be an interval of time G between death and distribution, if a valuation of the estate to be divided is to be made, it must be made, not at the date of death, but at the date of distribution. Where, however, distribution is to take effect at death, and, for the purpose of distribution, a valuation has to be made, it does seem to me, as it seemed to FARWELL, J., to be convenient to H make the valuation as at death.

In my judgment, the case I have to decide is not covered by the decision of SIMONDS, J., in *Re Wills, Dulverton v. Macleod* (2). It is exactly covered by the decision of FARWELL, J., in *Re Gunther's Will*

Trusts, Alexander v. Gunther (1). That decision binds me. I must follow it, and, in accordance with it, I answer the first question by saying that, in the words of question 1 (b), the estate must be divided upon the basis of :

. . . the value of the residuary estate of the testator as at the date of the testator's death and dividing the assets to be distributed between the larger share and the smaller share in the proportions borne by one moiety of such value plus the sum of £15,000 to one moiety of such value less the sum of £15,000. A

Costs to be taxed as between solicitor and client and paid by the plaintiffs out of the testator's estate.

Solicitors : *Stafford Clark & Co.*, agents for *Ironside & Co.*, Leicester B
(for the plaintiffs and all defendants other than the first defendant);
Field, Roscoe & Co., agents for *Whetstone & Frost*, Leicester (for the first defendant).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

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CANADA RICE MILLS, LTD. v. UNION MARINE AND
GENERAL INSURANCE CO., LTD.

[HOUSE OF LORDS (Viscount Maugham, Lord Russell of Killowen, Lord Wright, Lord Porter), **July 23, 24, 25, 29, September 24, 1940.**]

A *Privy Council—Canada—Insurance—Marine insurance—Rice damaged through lack of ventilation—Ventilators closed on account of rough weather—Damage caused by perils of the seas.*

Privy Council—British Columbia—Practice—Power of court to draw conclusion of fact—Rice damaged by closing of ventilators—No finding of fact by jury that ventilators were closed on account of perils of the seas—Rules of Court of British Columbia, Ord. 58, r. 4.

B The appellants claimed under a policy of marine insurance in respect of certain parts of a cargo of rice which, they alleged, had been damaged in the course of transit from Rangoon to the Fraser River. The insurance covered (among other risks) perils of the seas, and all other perils, losses and misfortunes which have or shall come to the hurt or damage of the subject-matter of the insurance. The rice in question was stowed in
C holds of the ship which were ventilated partly by cowl ventilators and hatches. During the voyage these ventilators and hatches had to be closed owing to rough weather, and, in consequence, the rice became overheated. At the trial the jury found, *inter alia*, that the rice was damaged by the heat caused by closing the cowl ventilators and hatches, and that this was the proximate cause of the damage, and also that, during the time the cowl ventilators and hatches were closed, the weather and
D sea were such as to constitute a peril of the sea. There was no direct finding that the perils of the seas caused the closing of the cowl ventilators and the hatches. It was contended by the respondents that there was no evidence as to the peril of the sea, and that the *causa proxima* of the damage was the deliberate act of the master in closing the hatches and ventilators and was not a peril of the sea :—

E HELD : (i) an appeal court was entitled, in the circumstances, under the power conferred on it by Ord. 58, r. 4, of the Rules of Court of British Columbia (identical with the English R.S.C., Ord. 58, r. 4), to draw the conclusion that the ventilators and hatches were closed by reason of perils of the seas.

(ii) the incursion of seawater through the ventilators and hatches would have been within the legal definition of perils of the seas.

F (iii) the damage, being in fact caused by action taken necessarily and reasonably to prevent the peril of the sea affecting the goods, was itself a loss due to perils of the seas and recoverable as such.

(iv) if not a loss by perils of the seas, the loss was covered by the general words, i.e., "all other perils, losses and misfortunes that have or shall come to the hurt or damage of the subject-matter of the insurance."

G [EDITORIAL NOTE. When the master of a ship takes deliberate action to avoid future perils of the seas, it is possible that the cause of the loss is the deliberate act of the master and not the perils of the seas, but, where his action is to avoid a peril of the sea that is then actually operating, then the cause of the loss is the peril of the sea. This distinction is necessarily largely dependent of the facts of each particular case, and that may tend to make the reported decisions a little
H difficult to classify, but the principle seems clear.

AS TO PERILS OF THE SEAS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 297-313, paras. 420-437 ; and FOR CASES, see DIGEST, Vol. 29, pp. 197, 198, Nos. 1566-1579.]

Cases referred to :

(1) *McPhee v. Esquimalt & Nanaimo Ry. Co.* (1913), 27 W.L.R. 444 ; 34 Digest 233, case 1979i.

- (2) *Paquin, Ltd. v. Beauchlerk*, [1906] A.C. 148 ; 1 Digest 622, 2475 ; 75 L.J.K.B. 395 ; 94 L.T. 350.
- (3) *Mechanical & General Inventions Co., Ltd., and Lehewess v. Austin and Austin Motor Co., Ltd.*, [1935] A.C. 346 ; Digest Supp. ; 104 L.J.K.B. 403 ; 153 L.T. 153.
- (4) *M'Govern v. Nimmo (James) & Co.*, [1937] S.C. 473 ; Digest Supp.
- (5) *Wilson, Sons & Co. v. Xantho (Cargo Owners)* (1887), 12 App. Cas. 503 ; A 29 Digest 197, 1567 ; 56 L.J.P. 116 ; 57 L.T. 701.
- (6) *Hamilton, Fraser & Co. v. Pandorf & Co.* (1887), 12 App. Cas. 518 ; 29 Digest 203, 1624 ; 57 L.J.Q.B. 24 ; 57 L.T. 726.
- (7) *Thames & Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484 ; 29 Digest 197, 1575 ; 56 L.J.Q.B. 626 ; 57 L.T. 695 ; *revsq.* S.C. *sub nom.* *Hamilton v. Thames & Mersey Marine Insurance Co.* (1886), 17 Q.B.D. 195.
- (8) *Mountain v. Whittle*, [1921] 1 A.C. 615 ; 29 Digest 127, 799 ; 90 L.J.K.B. 699 ; 125 L.T. 193 ; *affg.*, [1920] 1 K.B. 447.
- (9) *The Thrumscoe*, [1897] P. 301 ; 41 Digest 417, 2604 ; 66 L.J.P. 172 ; 77 L.T. 407.
- (10) *Leyland Shipping Co. v. Norwich Union Fire Insurance Society*, [1918] A.C. 350 ; 29 Digest 229, 1858 ; 87 L.J.K.B. 395 ; 118 L.T. 120 ; *affg.*, [1917] 1 K.B. 873.
- (11) *Samuel (P.) & Co. v. Dumas*, [1924] A.C. 431 ; 29 Digest 112, 666 ; 93 L.J.K.B. 415 ; 130 L.T. 771 ; *affg. sub nom. Samuel (P.) & Co. v. Dumas, Graham Joint Stock Shipping Co. v. Merchants Marine Insurance Co.* (No. 2), [1923] 1 K.B. 592.
- (12) *Stanley v. Western Insurance Co.* (1868), L.R. 3 Exch. 71 ; 29 Digest 321, 2635 ; 37 L.J.Ex. 73 ; 17 L.T. 513.
- (13) *Builer v. Wildman* (1820), 3 B. & Ald. 398 ; 29 Digest 224, 1817.
- (14) *The Knight of St. Michael*, [1898] P. 30 ; 29 Digest 215, 1718 ; 67 L.J.P. 19 ; 78 L.T. 90.
- (15) *Becker, Gray & Co. v. London Assurance Corpn.*, [1918] A.C. 101 ; 29 Digest 208, 1675 ; 87 L.J.K.B. 69 ; 117 L.T. 609 ; *affg.*, [1915] 3 K.B. 410 ; [1916] 2 K.B. 156.

APPEAL from a judgment of the Court of Appeal for British Columbia dated Feb. 1, 1939, whereby an appeal from the judgment of the Supreme Court (ROBERTSON, J., sitting with a special jury) was allowed. The facts and arguments are fully set out in the judgment of their Lordships delivered by LORD WRIGHT.

Valentine Holmes for the appellants.

H. U. Willink, K.C., and *Cyril Miller* for the respondents.

LORD WRIGHT : The appellants claimed in this action as assured under a floating policy of marine insurance, dated Dec. 19, 1929, upon shipments of rice imported by the appellants to their rice mills in British Columbia, as from time to time declared under the policy. The policy covered (among other risks) perils of the seas, and also, under what are often described as the general words, all other perils, losses and misfortunes that have or shall come to the hurt or damage of the subject-matter of the insurance. The goods were warranted free of particular average under 3 per cent. on each package. The seaworthiness of the ship as between the assured and the assurers was admitted. Under this

policy, the appellants duly declared a full cargo of 50,600 bags of rice, weighing 5,080 tons, shipped on or about Apr. 23, 1936, in the motor vessel Segundo at Rangoon for their dock on the Fraser River. The bags were valued in all at \$191,922. Included in the shipment so declared were 7,500 bags of brown rice valued at \$30,798 and marked A 163 and 102. The shippers were Blackwood Ralli & Co. of Rangoon. The claim is made in respect of the rice declared under these two marks, which are compendiously referred to as 163. No claim is made in respect of the other marks shipped, which bore respectively the marks K.G., A.L.Z., and N.L.Z. The respondents issued a certificate of insurance in respect of the whole shipment. B

The Segundo was a motor vessel of 4,414 tons gross and 2,668 tons net, registered at Oslo. She had 5 holds. The bags of the marks 163 and 102 were stowed partly in No. 2 hold, which was forward of the engine and boiler space, and partly in No. 3 hold, which was aft of that C space. The cargo throughout was well dunnaged, and was stowed with adequate air spaces. There were also vertical wooden trunk ventilators and ordinary wooden rice ventilators in each hold. The system of ventilators throughout consisted of cowl ventilators, with Samson post ventilators at each hold in addition. These latter were always open, D but it was necessary that the cowl ventilators should be also open to ensure a through current of air in the holds. There is no complaint of the sufficiency of the ventilation system. The Segundo arrived at Fraser River on May 28, 1936. It was then found that all the rice had heated, but, by reason of the franchise of 3 per cent. in the case of E particular average, and also because the rice in the bags marked 163 and 102 was of finer quality, it was decided that the claim against the respondents as insurers should be limited to these marks.

A primary issue in the action was what was the condition of the rice on shipment, since it was contended that the damaged condition of the F rice was due, not to perils insured against, but to the inherent vice of the goods when shipped. On that issue, a commission to take evidence went to Rangoon, where a large number of witnesses gave evidence. At the trial, which took place in the Supreme Court of British Columbia before ROBERTSON, J., and a special jury, and lasted for 7 days, the G jury, as will appear later, found that the rice was in good and sound condition when shipped. No complaint has been made of the summing up. There was abundant evidence to justify the jury's finding on that issue, which was accordingly concluded in the appellants' favour. The question remained, therefore, whether the appellants had established H that the damage was due to perils insured against. The appellants' case was that the damage was due to interference with the ventilation consequent on bad weather during the voyage, which caused the closing of the cowl ventilators, which it was necessary to keep open to ensure through ventilation. The evidence was that rice is a commodity very liable to heat if not fully ventilated while being carried in the ship's

hold. It has a considerable moisture content, and has a capacity of absorbing further moisture. If this moisture is not carried off by ventilation, a process of fermentation sets in and damages the grain. The heating thus caused when the ventilation was shut off would tend to develop even after full ventilation was restored. The ventilators have to be closed when water will get to the cargo if they are not closed. When the ventilators are again opened, the cooler air circulating through them also sets up a condensation in the hot, moist and humid atmosphere of the hold, and precipitates moisture on the rice. If a process of fermentation is thus started, it may go on for the rest of the voyage, even though the ventilators are not again closed.

In a case of damage to cargo such as the present, the evidence from those in the ship of what happened during the voyage is vital, and is generally given by the ship's officers. In this case, however, a translation of the ship's log was accepted as the sole evidence from the ship. It is necessarily very brief in its narrative, and might well have called for explanation on many points, but, such as it was, it was put to the jury as the material for their decision on this aspect of the case. They were called upon to make such findings or draw such inferences of fact from the log as seemed to them to be right, with the aid of such expert evidence as was laid before them. The log shows that from Apr. 24, 1936, the day on which the *Segundo* sailed from Rangoon, until Apr. 27, 1936, when she was in the Straits of Malacca, the ventilators were not closed. On that day, for some short period the ventilators were covered "on account of unsettled weather," and later in the day they were again covered, on account of rain, until the next day. Then for a few hours on the night of Apr. 30, 1936, they were again covered on account of rain, and yet again covered on account of heavy showers for a few hours on May 1, 1936. Thereafter there is no entry of any moment until May 8, 1936.

The judge, in summing up, told the jury that the case of the appellants, which was that the damage was caused by the closing of the cowl ventilators and hatches during the voyage, really came down to the question of the period from May 8 to May 13. May 13, it is clear, should read as May 11. Either the judge made a momentary slip or he was misreported. It is therefore necessary particularly to examine the log entries from May 8 to May 11. On May 8, the vessel was driving against heavy head seas, with much pitching. At 19.30 (or 7.30 p.m.), the covers were put on the ventilators, owing to rain. On May 9, the log records heavy head seas, pitching, and spray over decks and hatches, and similar entries throughout the day, with half a gale or a fresh gale. On May 10, there are similar entries, continuous heavy head seas, spray over fore deck, and, later in the day, the entry was that she was shipping some seas over the forepart of the vessel. About mid-day, the wind became a strong gale, with hurricane-like squalls at times. The vessel was driving into a head wind and sea, with pitching and rolling, at times

described as tremendous. At 1 a.m. on May 11, the covers were removed from the hatches. It is this period in particular—namely, May 9, 10—which the appellants rely on as involving a long continuous interruption of ventilation, and as causing the heating and fermentation which was eventually discovered at the end of the voyage. Captain

- A Brown Watson, an expert called on behalf of the respondents, agreed that on May 9 and May 10 there was reason for closing the ventilators at least on the forward end to prevent damage to cargo—that is, to prevent the cargo from getting wet. He did seem disposed to draw a distinction between the forward end and the after end of the ship, but no attempt
- B was made to distinguish different parts of the damaged rice, and the jury, with the material they had before them, were entitled to find, if so minded, that the ventilators were properly closed on May 9 and May 10 for the safety of the cargo, and to reject the distinction between the different holds suggested by Captain Brown Watson. On May 15,
- C there is an entry that covers were put on the ventilators owing to humidity or fog, but only for a few hours, and similarly for a few hours on May 16 and on May 17. Later on that day, the vessel ran into bad weather, and shipped some spray over the decks, but the wind was a following wind, and the ventilators were not closed, except for a brief
- D period on May 18, when there was a heavy sea and a gale. That again was a case of a following sea and gale. On May 25 and May 26, for about 21 hours, the ventilators were closed on account of rain. On May 28, the vessel arrived at Fraser River. It thus appeared that for about 50-odd hours on May 9 and May 10 there was a continuous closing of the
- E ventilators, and evidence on which the jury might find that it was due to conditions of wind and sea and that it was the cause of the damage. The closing of the ventilators on account of rain was for brief periods. Rain is not a peril of the sea, but, at most, a peril on the sea ; but there is now no real issue that the damage was due to rain.

- F At the conclusion of the case, after lengthy arguments, the jury were required to give a special verdict on specific questions. Question 3 dealt with the condition of the rice on shipment. It was answered in favour of the appellants, as already stated. Questions and answers 6 to 10 should be set out in full :

- G 6. Was the said shipment damaged by heat caused by the closing of the cowl ventilators and hatches from time to time during the voyage ?—Yes.

7. If the answer to No. 6 is in the affirmative, was the closing of the ventilators and hatches the proximate cause of the damage ?—Yes.

8. Was the weather and sea during the time the cowl ventilators and hatches were closed such as to constitute a peril of the sea ?—Yes.

- H 9. If the answer to No. 8 is in the affirmative, what were the conditions of the weather and sea ?—Heavy winds from May 8 to May 11, with high seas ; from May 11 to May 17, moderate weather and moderate seas, after which latter date, strong gales and very rough seas up to May 20 ; variable seas and weather after that date.

10. Did the plaintiff thereby suffer loss exceeding 3 per cent. on each package ?—No, only on 163.

Some discussion took place, both in the Courts of British Columbia and before their Lordships, on the form of questions 7 and 8, in particular

in regard to the word "proximate" in question 7, and in regard to the omission to ask the jury if the peril of the sea was the cause of the closing of the ventilators and hatches. On this latter point, their Lordships would feel justified, if it were necessary, to act upon the Rules of Court of British Columbia, Ord. 58, r. 4. That rule is identical with the English R.S.C., Ord. 58, r. 4, which gives the Court of Appeal power, *inter alia*, to draw inferences of fact and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require, as well as to receive further evidence. The rule is intended to obviate a new trial in cases where such a course can properly be avoided, and applies even in cases tried with a jury. In the present case, the jury have found that there were perils of the seas during the period when the ventilators were closed. What is wanting is the finding that there was not merely concurrence in time, but that the perils of the seas caused the closing. The connection is so obvious that, if necessary, the court is entitled to draw an inference of fact that the closing was so caused. Their Lordships were referred to a decision of the Supreme Court of Canada, *McPhee v. Esquimalt & Nanaimo Ry. Co.* (1), in which the rule was discussed. The English rule has frequently been discussed in English courts—for instance, in *Paquin, Ltd. v. Beauclerk* (2) and in *Mechanical & General Inventions Co., Ltd., and Lehwess v. Austin and Austin Motor Co., Ltd.* (3). In the present case, the Court of Appeal in British Columbia regarded themselves as precluded from going beyond a narrow reading of the findings of the jury by a decision of the House of Lords in *M'Govern v. Nimmo (James) & Co.* (4), where LORD ATKIN said that the court cannot itself supply an answer to a missing question. That decision was, however, in an appeal from the Scottish courts, where there is no rule corresponding to R.S.C., Ord. 58, r. 4, and where the appellate court has only the record and verdict before it. In their Lordships' judgment, the decision in *M'Govern's* case (4) cannot, in view of R.S.C., Ord. 58, r. 4, be applied to English or British Columbian appeals. In truth, however, their Lordships are of opinion that the difficulty can be more simply dealt with. The jury answered the specific questions put to them. Why there was no express question directed to the causal relationship between the closing of the ventilators and the perils of the seas is not material. The judge is responsible for the questions put, and the jury have only these questions before them. It may be that all concerned thought the connection too obvious to call for a special question. No doubt some confusion has been introduced by the form of question 7—namely, "... was the closing of the ventilators and hatches the proximate cause of the damage?" However, if the questions and answers are construed fairly, and construed as a whole, it is clear, in their Lordships' judgment, that what was meant by proximate was "last in time." The judge, in summing up, directed the jury's special attention, by putting question 8, to the fact that the policy insured the plaintiff

against damage to the rice arising from perils of the seas. Thus the idea of causal *nexus* was brought to their minds. Question 9—or, perhaps, the answer—is somewhat difficult to understand, but the answer at least deals specifically with the crucial period from May 8 to May 11, describing it as a period of heavy winds and high seas. The
 A period of the voyage up to May 8 is not treated as material, and the subsequent part of the voyage may be disregarded.

On these findings, supplemented by further findings as to the amount of damage, the judge entered judgment for the appellants. The Court of Appeal by a majority set aside that judgment, mainly, as it seems,
 B on grounds of law. There was, it was held, no evidence of perils of the seas. The conclusion appears to have been based on a view as to the meaning of perils of the seas. It was held, however, that, even if there were perils of the seas, they did not constitute the *causa proxima* for purposes of insurance law, because the *causa proxima* was the deliberate
 C act of the master in closing the ventilators. These points are fully developed in the judgment of SLOAN, J.A. MARTIN, C.J., in agreeing with the reasons of SLOAN, J.A., rather emphasised the purely verbal aspect of the jury's finding as to the proximate cause, and thought that, so far from finding that the peril of the seas was the proximate
 D cause of the loss, they had come to the conclusion that the loss was due to something else—namely, the closing of the ventilators. On this matter, their Lordships have already expressed their opinion. Their Lordships are unable, with all respect, to agree with the reasoning of SLOAN, J.A., in his careful opinion, and in the arguments advanced
 E before them in support of it. The two main questions must be discussed separately.

The first question—namely, whether, on the evidence, the jury were justified in finding that there was a peril of the sea—depends on the meaning to be attached to those words in a policy of marine insurance.
 F The trial judge directed the jury that the words referred to fortuitous accident or casualty of the seas, but did not include the ordinary action of the wind and wave. In British Columbia, the law of marine insurance is now to be found in the British Columbian Marine Insurance Act, 1936, which for all practical purposes is the same as the English Marine
 G Insurance Act, 1906, which was a codifying Act. Authorities under the latter Act are properly cited as authorities in respect of the former. The judge in his direction to the jury was quoting r. 7 in the first schedule to the Act. In considering the material questions, it is helpful in the first instance to assume that the ventilation was not closed, but that
 H the sea or spray had actually wet the rice and caused the damage. The other question—namely, that of the *causa proxima*—can then be considered separately. The view of SLOAN, J.A., seems to be that there was no peril of the sea, because, in his opinion, the weather encountered was normal, and such as to be normally expected on a voyage of that character, and that there was no weather bad enough to endanger the

safety of the ship if the ventilators had not been closed. However, these are not the true tests. In the House of Lords, in *Wilson, Sons & Co. v. Xantho (Cargo Owners)* (5), which was a bill of lading case, but has always been cited as an authority on the meaning of the same words in policies of marine insurance (see *per* LORD BRAMWELL in *Hamilton, Fraser & Co. v. Pandorf & Co.* (6), at p. 527), LORD HERSCHELL said, A at p. 509 :

The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the seas which were occasioned by extraordinary violence of the wind or waves. I think this is too narrow a construction of the words and it is not supported by the authorities or by common understanding. B It is beyond question that if a vessel strikes upon a rock in fair weather and sinks, this is a loss by perils of the seas.

In *Thames & Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (7), LORD MACNAGHTEN said, at p. 502, that it was impossible to frame a definition of the words. In *Hamilton, Fraser & Co. v. Pandorf & Co.* (6), C where a rat had gnawed a hole in a pipe, whereby seawater entered and damaged the cargo, there was no suggestion that the ship was endangered, but the damage to the cargo of rice was held to be due to a peril of the sea. There are many contingencies which might let the water into the ship besides a storm, and, in the opinion of LORD D HALSBURY in *Hamilton, Fraser & Co. v. Pandorf & Co.* (6), any accident which should do damage by letting seawater into the vessel should be one of the risks contemplated.

Where there is an accidental incursion of seawater into a vessel at a part of the vessel, and in a manner, where seawater is not expected E to enter in the ordinary course of things, and there is consequent damage to the thing insured, there is *prima facie* a loss by perils of the seas. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause bringing the F sea over openings ordinarily not exposed to the sea, or, even without stress of weather, by the vessel heeling over owing to some accident, or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the seawater which G is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the seawater is not expected or intended to enter, and, if it enters, enters only by accident or casualty. H The cowl ventilators are such openings. If they are not closed at the proper time to prevent seawater coming into the hold, and if seawater does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connection. The rush of seawater which, but for the covering of the

ventilators, would have come into them and down to the cargo was in this case due to a storm which was sufficiently out of the ordinary to send seas or spray over the orifices of the ventilators. The jury may have pictured the tramp motor vessel, heavily laden with 5,000 tons of rice, driving into the heavy head seas, pitching and rolling tremendously and swept by seas or spray. Their Lordships do not think that it can properly be said that there was no evidence to justify their finding. On any voyage, a ship may, though she need not necessarily, encounter a storm, and a storm is a normal incident on such a passage as the *Segundo* was making, but, if, in consequence of the storm, cargo is damaged by the incursion of the sea, it would be for the jury to say whether or not the damage was due to a peril of the sea. They are entitled to take a broad commonsense view of the whole position. How slight a degree of the accidental or unexpected will justify a finding of loss by perils of the sea is illustrated by *Mountain v. Whittle* (8), where a houseboat, the seams of which above the waterline had become defective, was towed in fine weather and in closed water in order to be repaired. A powerful tug was employed, and this caused a bow wave so high as to force water up into the defective seams. There was no warranty of seaworthiness. LORD SUMNER said, at p. 630 :

- D Sinking by such a wave seems to me a fortuitous casualty ; whether forced by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towing.
- In the same way, storms at sea may be frequent, in some cases seasonal, like typhoons in the China seas. A ship may escape them, and they are outside the ordinary accidents of wind and sea. They may happen on the voyage, but it cannot be said that they must happen. In their Lordships' judgment, it cannot be predicated that, where damage is caused by a storm, even though its incidence or force is not exceptional, a finding of loss by perils may not be justified.
- F There remains the second question—namely, whether the damage which was caused, not by the incursion of seawater, but by action taken to prevent the incursion, is recoverable as a loss by perils of the seas. It is curious that, so far as their Lordships know, there is no express decision on this point under a policy of marine insurance, but, in their Lordships' judgment, the question should be answered in the affirmative, as they think the jury did. The answer may be based on the view that, where the weather conditions so require, the closing of the ventilators is to be regarded, not as a separate or independent cause, interposed between the peril of the sea and the damage, but as being such a mere matter of routine seamanship necessitated by the peril that the damage can be regarded as the direct cause of the peril. In *The Thrunsoe* (9), where a cargo of oats and maize had been damaged by the closing of the ventilators owing to heavy weather, it was held that the damage was caused by perils of the seas. The severity of the weather (there referred to as exceptional, though the adjective is immaterial) was described by

SIR FRANCIS JEUNE, P., as the proximate cause of the damage, because the closing of the ventilators was due to that cause, and GORELL BARNES, J., described it as the direct cause. It is true that the case dealt with the exceptions in the bill of lading, to which the doctrine of *causa proxima* does not apply in the same way as in insurance law, but it is now established by such authorities as *Leyland Shipping Co. v. Norwich Union Fire Insurance Society* (10) and many others that *causa proxima* in insurance law does not necessarily mean the cause last in time, but what is "in substance" the cause (*per* LORD FINLAY, at p. 355), or the cause "to be determined by commonsense principles" (*per* LORD DUNEDIN, at p. 362). The same rule has been reiterated by the House of Lords several times since then, most strikingly, perhaps, in *Samuel (P.) & Co. v. Dumas* (11), where it was held by a majority of the Lords that, where a ship insured by the mortgagee was lost by being scuttled by the deliberate act or procurement of the mortgagor, it was not in insurance law to be deemed a loss by perils of the seas. The proximate cause was the intentional and fraudulent act which let in the seawater and sank the vessel. In cases of fire insurance, it has been said that loss caused from an apparently necessary and *bona fide* attempt to put out a fire by spoiling goods by water, and in other ways, is within the policy: *per* KELLY, C.B., in *Stanley v. Western Insurance Co.* (12), at p. 74. Their Lordships agree with this expression of opinion, and accordingly are prepared to hold that the damage to the rice, which the jury have found to be due to action necessarily and reasonably taken to prevent the peril of the sea affecting the goods, is a loss due to a peril of the sea, and is recoverable as such.

The same result may be reached by a somewhat different approach. It may be held that, though such a loss is not strictly recoverable as a loss by perils of the seas, it is within the general words "all other perils, losses and misfortunes," which are contained in the policy and have been quoted above. It is true that these general words have to be construed as restricted to cases akin to, or resembling, or of the same kind as, those specially mentioned by LORD MACNAGHTEN in *Thames & Mersey Marine Insurance Co. v. Hamilton, Fraser & Co.* (7), at p. 501, where they were held not to cover the loss claimed, but, subject to that limitation, they may be used to give some extension to the specific perils, such as perils of the seas. Thus, in *Butler v. Wildman* (13), a master of a ship, in order to prevent a quantity of dollars falling into the hands of the enemy by whom he was about to be attacked, threw them into the sea, and was immediately afterwards captured. It was held that the loss came within the general words of the policy, if it did not fall strictly within the specific words "jettison" or "enemies." As was said by BEST, J., at p. 406, the general words had the effect of: . . . including all losses which are the consequences of justifiable acts done under the certain expectation of capture or destruction by enemies.

The same principle was applied by GORELL BARNES, J., in *The Knight*

of *St. Michael* (14), where a cargo of coal had become so heated that the vessel was compelled to put into a port of refuge, and a large portion of the cargo was discharged and sold, entailing a loss of freight. No fire had actually broken out. GORELL BARNES, J., held that the loss was recoverable, if not as a loss by fire, as a loss *ejusdem generis*, and covered

A by the general words.

It is obvious that in these two cases there was no question of turning away to avoid a future peril. If there had been, the loss might properly have been held to be due, not to the peril, but to deliberate action to avoid coming into the area of the peril, as in *Becker, Gray & Co. v.*

B *London Assurance Corpn.* (15) and similar cases. However, in *Butler v. Wildman* (13) and *The Knight of St. Michael* (14), the subject of the insurance was actually in the grip of the peril—enemies in the one case and fire in the other. The correctness of these authorities has not been doubted, and their Lordships think that they were rightly decided.

C Indeed, in *Becker, Gray & Co. v. London Assurance Corpn.* (15), at p. 118, LORD SUMNER expressly cites with approval *The Knight of St. Michael* (14) as a decision on the general words in the policy, and distinguishes it from the case then before him. Similarly in the present case there was an actually operating peril of the sea. There was accordingly

D either a loss by perils of the seas or a loss within the general words. In their Lordships' judgment, no ground has been shown for setting aside the verdict of the jury, and the appeal should be allowed and the judgment of the Supreme Court restored. The respondents will pay to the appellants their costs of this appeal and in the courts below.

E They will humbly so advise His Majesty.

Appeal allowed with costs.

Solicitors: *Charles Russell & Co.* (for the appellants); *Gard, Lyell & Co.* (for the respondents).

[Reported by CHARLES SHELLEY, ESQ., Barrister-at-Law.]

F

CONNORS BROS., LTD. AND OTHERS v. CONNORS.

[PRIVY COUNCIL (Viscount Simon, L.C., Viscount Maugham, Lord Russell of Killowen, Lord Wright and Lord Porter), **July 18, 22, 23, September 24, 1940.**]

G

Privy Council—Canada—Trade—Covenant in restraint of trade—Covenant not directly or indirectly to engage in sardine business in Canada—Covenant entered into by managing director of company on sale of controlling interest in company—Injury to public—How far covenantor prevented from holding shares in competing company—Declaration as to validity of covenants.

H

The respondent and other members of his family had been engaged for many years in Canada in the business of packing and canning fish, including sardines. In 1923, they sold their business to one Neil McLean and his associates, who then formed a company, the appellants Connors Bros., Ltd., to carry on the business. Immediately afterwards, the respondent formed a new company, the appellants Lewis Connors & Sons, Ltd., and this company traded in the severest competition with the

first appellants. As a result of this competition, Lewis Connors & Sons, Ltd., were brought to the verge of insolvency, and, in order to avoid the dissolution of this company, the respondent approached Connors Bros., Ltd., for the purpose of effecting a settlement. As a result of these negotiations, the respondent and the McLean group entered into an agreement on Apr. 30, 1925, whereby the McLeans were to buy from the Connors a controlling interest in Lewis Connors & Sons, Ltd., while the holders of the remaining stock of that company could require Connors Bros., Ltd., within a stated period to purchase from them their holdings at a stated price. It was also provided that the McLeans would cause Connors Bros., Ltd., to relieve the respondent from certain personal liabilities, that the respondent should continue as a director of Lewis Connors & Sons, Ltd., until he exercised his option to sell his holding in that company, and also that he should be employed as manager of the same company at a salary. Finally, all parties to the agreement covenanted not to engage in any other sardine business whatsoever in Canada. In subsequent agreements, the respondent covenanted with Connors Bros., Ltd., and Lewis Connors & Sons, Ltd., that he would not carry on a sardine business in Canada. In 1937, the respondent, proceeding by originating summons, asked the court to determine whether he was barred by the covenants from engaging in the sardine business in Canada as owner by himself or in partnership with others of such a business, or as shareholder of an incorporated company engaged in such business in Canada :—

HELD : (i) the covenant was not void for uncertainty.

(ii) the general principles applying to restrictive covenants on the sale of the goodwill of a business apply where the goodwill sold is the property of a limited company and the covenant is given by those who have been managing and carrying on the company's affairs.

(iii) the same principles will apply, in the proper circumstances, upon a sale of the shares or stock of a company, or a large interest therein, where the vendors enter into restrictive covenants with the purchaser.

(iv) the covenant was reasonable as between the parties, as the business of each of the appellants extended throughout Canada. In order to prove this Dominion-wide business, it was not necessary to prove that the business had been carried on in every part of the area mentioned.

(v) the covenant was not injurious to the public, as it did not necessarily confer a monopoly on the appellants.

(vi) in the circumstances, the respondent was barred from engaging in the sardine business in Canada as owner by himself or in partnership with others.

(vii) no answer should be given as to his holding shares in an incorporated company carrying on such a business, as the court will not determine future rights before the circumstances involving those rights have arisen, or if such circumstances have not been proved to the satisfaction of the court.

[EDITORIAL NOTE.] In the ordinary course, the courts only decide causes upon ascertained facts. To some extent this rule has been modified by the system of giving declaratory judgments. The making of a declaration by the court is always a discretionary matter, and the courts generally refuse to make a declaration where the result will be dependent upon the facts when ascertained. For these reasons, the court has, in the present case, refused to deal with some of the questions asked. Of the actual decisions reached, the most important would seem to be that upholding the validity of a restriction extending throughout the Dominion of Canada.

AS TO RESTRICTIVE COVENANTS, see HALSBURY, *Hailsham Edn.*, Vol. 32, pp. 411-418, paras. 689-698 ; and FOR CASES, see DIGEST, Vol. 43, pp. 21-26, Nos. 135-173.]

Cases referred to :

- (1) *A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., Ltd.*, [1913] A.C. 781 ; 43 Digest 12, 68 ; 83 L.J.P.C. 84 ; 109 L.T. 258.
- (2) *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.*, [1894] A.C. 535 ; 43 Digest 22, 139 ; 63 L.J.Ch. 908 ; 71 L.T. 489 ; *affg.*, [1893] 1 Ch. 630.
- (3) *Horner v. Graves* (1831), 7 Bing. 735 ; 43 Digest 26, 181 ; 9 L.J.O.S.C.P. 192.
- A (4) *Vancouver Malt & Sake Brewing Co., Ltd. v. Vancouver Breweries, Ltd.*, [1934] A.C. 181 ; Digest Supp. ; 103 L.J.P.C. 58 ; 150 L.T. 503.
- (5) *Mason v. Provident Clothing & Supply Co., Ltd.*, [1913] A.C. 724 ; 43 Digest 22, 143 ; 82 L.J.K.B. 1153 ; 109 L.T. 449 ; *revsq.*, [1913] 1 K.B. 65.
- (6) *Herbert Morris, Ltd. v. Saxelby*, [1916] 1 A.C. 688 ; 43 Digest 24, 154 ; 85 L.J.Ch. 210 ; 114 L.T. 618 ; *affg.*, [1915] 2 Ch. 57.
- B (7) *McEllistram v. Ballymacelligott Co-operative Agricultural & Dairy Society*, [1919] A.C. 548 ; 43 Digest 35, 309 ; 88 L.J.P.C. 59 ; 120 L.T. 613.
- (8) *Whittaker v. Howe* (1841), 3 Beav. 383 ; 43 Digest 68, 722.
- (9) *Tallis v. Tallis* (1853), 1 E. & B. 391 ; 43 Digest 30, 240 ; 22 L.J.Q.B. 185 ; 21 L.T.O.S. 43.
- (10) *Rousillon v. Rousillon* (1880), 14 Ch.D. 351 ; 43 Digest 21, 133 ; 49 L.J.Ch. 338 ; 42 L.T. 679.
- C (11) *Fitch v. Dewes*, [1921] 2 A.C. 158 ; 43 Digest 34, 276 ; 90 L.J.Ch. 436 ; 125 L.T. 744 ; *affg.*, [1920] 2 Ch. 159.
- (12) *Hitchcock v. Coker* (1873), 6 Ad. & El. 438 ; 43 Digest 36, 326 ; 6 L.J.Ex. 266.

APPEAL by special leave from a judgment of the Supreme Court of Canada, dated Dec. 19, 1938, reversing the judgment of the Supreme Court of New Brunswick, Appellate Division, dated Feb. 8, 1938, dismissing an appeal from a judgment of BAXTER, C.J., in the Supreme Court of New Brunswick (Chancery Division), dated Aug. 24, 1940. The facts and arguments are fully set out in the judgment of their Lordships delivered by VISCOUNT MAUGHAM.

Frank Gahan for the appellants.

The respondent was not represented.

VISCOUNT MAUGHAM : This is an appeal from a judgment of the Supreme Court of Canada, dated Dec. 19, 1938, which (by a majority of three judges to two) reversed the judgment of the Supreme Court of New Brunswick, Appellate Division. The latter had dismissed an appeal from a judgment of BAXTER, C.J. The divergence of judicial opinion is striking, since 6 judges in Canada were in favour of the present appellants and 3 judges—the majority in the Supreme Court of Canada—took the other view. These differences have perhaps been accentuated by the curious shape which the proceedings assumed. The main question throughout has been whether certain covenants entered into by Bernard Connors, the present respondent, with the appellants, or any of those covenants, are enforceable, or whether, on the other hand, they are unenforceable as being in restraint of trade. This question has been raised, not in proceedings instituted by the covenantees to enforce some or one of the covenants, but by an originating summons issued under the Rules of the Supreme Court of New Brunswick, Ord. 54A, by the covenantor, the respondent, seeking to have it determined whether, upon

the construction of the covenants, he was barred from engaging in a certain business or from doing certain other acts. These questions were not in the main matters for construction at all, though incidentally some matters of construction might have arisen for the consideration of the court. They were questions of law based on public policy, depending to a large extent, no doubt, on the circumstances proved to exist at the time when the covenants were entered into. It is to be noted that BAXTER, C.J., seems to have entertained grave doubts as to the propriety of such a proceeding under Ord. 54A. To their Lordships, it seems clear that those doubts were more than justified. In the event, the case proceeded without the advantages of pleadings or particulars or discovery of documents. The respondent made a concise affidavit in support of his summons, in which he stated no facts or circumstances relating to the covenants beyond the statement that he was advised that they were not reasonably necessary for the protection of the appellants in their business, and were in the nature of an effort to stifle or prevent lawful competition. At the trial, he was cross-examined on his affidavit, and no further evidence was called on his behalf. The appellants then called 3 witnesses. In these circumstances, it is not surprising that the evidence before the court was not of a very satisfactory character, and that differing opinions as to its result have been formed by the judges in Canada who have had to deal with the matter. Their Lordships have thus to deal with an appeal on questions raised under Ord. 54A, which was not, in their view, an appropriate method of dealing with those questions, but, having regard to the fact that 3 courts have delivered their judgments on the footing that the questions were properly raised before them, their Lordships feel bound to follow the same course and to express their opinion on the materials submitted to them. It should be added that the respondent did not lodge his case in the usual way, and was not represented on the present appeal. Their Lordships naturally regret this circumstance, which adds to their difficulties, but they think it right to state that counsel for the appellants argued on their behalf with great candour and fairness, and they do not think that the respondent has suffered by reason of the absence of counsel on his behalf.

In or about 1890, the respondent's father and uncle, Lewis and Patrick Connors, established a business of canning fish of divers kinds, including sardines, in the Passamaquoddy area on the Bay of Fundy. It is not in dispute that this is the only area in Canada where it is commercially practicable to pack sardines, though there are a number of sardine-packers in the State of Maine on the other side of the Bay of Fundy. The business was a successful one, and it was transferred to a company (which may be called the old company) in which Lewis Connors, Patrick Connors and the respondent were shareholders. There were then two factories and the respondent was the superintendent of one of them. In 1923, the business then having become a very large one,

the shareholders sold all their shares to A. Neil McLean and 3 associates for \$400,000, payable as to \$200,000 in cash and as to \$200,000 in preferred stock of Connors Bros., Ltd. (one of the appellants), a company which, having been formed for that purpose, took over the assets of the old company. The respondent received \$16,667 for his shares in the old company. Connors Bros., Ltd., after acquiring the assets and goodwill of the old company, registered the name "Connors" as a trade mark to be used in connection with the sale of fish and fish products, and a little later registered as a trade mark the words "Connors' Famous Sea Food." Patrick Connors entered into a contract to act as general manager of Connors Bros., Ltd., for a period of 5 years at a salary of \$10,000 per annum. The respondent was offered a position in the company, but declined it. No restrictive covenant was entered into by the respondent with Connors Bros., Ltd., at this time.

Connors Bros., Ltd., were shortly afterwards faced with very severe competition throughout Canada and in the other countries in which they sold their products from a new business carried on by Lewis Connors, the respondent and another member of the family. This business was incorporated in 1924 under the name of "Lewis Connors & Sons, Ltd." (the second appellants). The capital issued amounted to \$150,000, divided into \$50,000 preferred and \$100,000 common stock, of which the respondent received a considerable amount from his father, Lewis Connors. The competition with Connors Bros., Ltd., as the trial judge found, was carried on by means not at all creditable to the respondent and his father. They canvassed for orders the old customers of the business, representing themselves to be "the original Connors." They adopted brands and letter-paper headings similar to those of Connors Bros., Ltd. They were selling, according to the finding of the trial judge, in all the provinces of Canada and in nearly every country in which Connors Bros., Ltd., had sold sardines. The respondent in cross-examination said : "I imagine we said we were the original and wanted to get the business." In this endeavour, they had cut prices to such an extent that they had been carrying on business at a loss. By 1925, they had reached a very unsatisfactory financial condition, which could not long continue. It was in these circumstances that Lewis Connors, plainly with the knowledge of the respondent (his son), who was a manager of the company, approached the directors of Connors Bros., Ltd., with a view to a settlement. Ultimately, an agreement, dated Apr. 30, 1925, which may be described as "the option agreement," was entered into between Lewis Connors and the respondent of the first part, and Neil McLean and Allan McLean of the second part. The two companies were not parties, but they were under the control of those stockholders who joined in the agreement. The covenants restricting trade which they all entered into are not those which the appellants could rely upon (since they were not parties), but the agreement shows very clearly the circumstances in which the covenant by the respondent now in question

was entered into a few weeks later, and the true nature of the transaction.

The substance of the option agreement was as follows. The McLeans were to buy from Lewis Connors and the respondent \$25,000 preferred and \$52,500 common stock of Lewis Connors & Sons, Ltd., and were to give in payment \$25,000 preferred and \$30,000 common stock of Connors Bros., Ltd. It is plain that the transaction would give the latter company a controlling interest in Lewis Connors & Sons, Ltd. With reference to the remaining capital stock of Lewis Connors & Sons, Ltd. (\$47,500 common and \$25,000 preferred stock), the McLeans undertook to procure a contract to be executed by Connors Bros., Ltd., with the stockholders of Lewis Connors & Sons, Ltd., providing that Connors Bros., Ltd., would at any time within 5 years from Jan. 1, 1926, and on demand from any of the stockholders of Lewis Connors & Sons, Ltd., who at the time of such demand held any part of the remaining outstanding issued capital stock of Lewis Connors, Ltd., purchase the holdings of such stockholders so making such demand on the basis of \$35,000 cash for \$72,500 capital stock. It was further provided by cl. 3 that the McLeans would procure a contract by Connors Bros., Ltd., to pay Lewis Connors a salary of \$1,500 per annum for 5 years for his services to Lewis Connors & Sons, Ltd., and a similar sum by way of salary from Connors Bros., Ltd., for nominal services. Clause 4 provided that the McLeans would cause Connors Bros., Ltd., to relieve Lewis and the respondent of a personal liability at the Bank of Nova Scotia. Clause 5 provided that Lewis Connors and the respondent should be continued as directors of Lewis Connors & Sons, Ltd., until they exercised their option to sell their stock in that company to Connors Bros., Ltd., and their stock was fully paid for. Clause 11 provided that the McLeans would procure that Lewis Connors & Sons, Ltd., should employ the respondent as manager for 5 years at a salary of \$5,000, with the prospect of its being \$7,500, the contract to be guaranteed by Connors Bros., Ltd. The agreement contemplated that Lewis Connors & Sons, Ltd., would continue to carry on business, and express provision was made as to the manner in which that was to be done.

Clause 9 provided as follows :

All parties hereto agree to work together for the benefit of the stockholders of Connors Bros., Ltd., and Lewis Connors & Sons, Ltd., and will not, either directly or indirectly, engage in any other sardine business whatsoever in the Dominion of Canada, nor directly or indirectly use the brands of either Connors Bros., Ltd., or Lewis Connors & Sons, Ltd., in the Dominion of Canada or elsewhere, nor, for a period of 10 years from the date hereof, use the name of Connors in connection with sardine business in any country whatsoever.

The agreement was stated to be conditional on its acceptance and ratification by Connors Bros., Ltd., and to constitute an option given by the parties of the first part to the parties of the second part, which option should expire on May 30, 1925, unless the parties of the second part should give notice in writing of its acceptance.

The option was duly exercised, and it was ultimately carried into effect by transfers of stock as agreed, which, however, were not produced in evidence. It was perceived that the control of Connors Bros., Ltd., was not adequately provided for, and a voting trust agreement was entered into on May 23, 1925, between Bernard Connors of the first part, the McLeans of the second part, and the Eastern Trust Co. of the third part. It recites that the parties of the first and second parts were shareholders in Connors Bros., Ltd., and had agreed to transfer 360 shares of the capital stock of that company to the trustee to the intent :

... that the stock should be voted in one block by A. Neil McLean after consultation [with the other parties to the agreement].

The agreement was expressed to be on the condition that McLean would vote the stock under proxy to him in support of the carrying out of the agreement between Lewis Connors and Bernard Connors and the McLeans bearing date Apr. 30, 1925, and also that, if Patrick W. Connors should cease to manage the sardine factory of Connors Bros., Ltd., the McLeans would give their support to obtaining the position for Bernard Connors at a salary of at least \$7,500 per annum, and also that Neil McLean would :

... vote the stock in favour of continuing the operation of the factory of Lewis Connors & Sons, Ltd., so long as the same is being operated at a profit [and would also vote in favour of Lewis Connors and Bernard Connors as directors of Connors Bros., Ltd.].

Two agreements in June, 1925, further carried into effect the option agreement. One was dated June 9, 1925, and was made between Connors Bros., Ltd., of the first part and Lewis and Bernard Connors of the second part. This recites that there was then issued an outstanding \$100,000 par value common stock and \$50,000 par value preferred stock of Lewis Connors & Sons, Ltd., and by contract of Apr. 30, 1925, that Lewis and Bernard Connors had agreed to sell to the McLeans \$25,000 par value preferred stock and \$52,000 par value common stock of Lewis Connors & Sons, Ltd. The agreement witnessed that, with reference to the remaining outstanding issued common stock of Lewis Connors & Sons, Ltd., Connors Bros., Ltd., would at any time within 5 years from Jan. 1, 1926, and on demand from any then stockholder of Lewis Connors & Sons, Ltd., purchase the holdings of such stockholder on the option mentioned in the previous agreement. Para. 4 provides as follows :

The said Lewis Connors and Bernard Connors agree with the said Connors Bros., Ltd., that they will not, either directly or indirectly, engage in any other sardine business whatsoever in the Dominion of Canada nor directly or indirectly use the brands either of Connors Bros., Ltd., or Lewis Connors & Sons, Ltd., in the Dominion of Canada or elsewhere nor for a period of 10 years from Apr. 30, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever.

This is the important covenant in the present appeal. The date mentioned in it was the date of the option agreement. The other agree-

ment, which was of even date, was made between Bernard Connors of the first part, Lewis Connors & Sons, Ltd. of the second part, and Connors Bros., Ltd. of the third part, and by it the respondent agreed to work for Lewis Connors & Sons, Ltd., under the direction of a board of directors in the capacity of manager of the company's sardine factory in the city of St. John for a period of 5 years and Lewis Connors & Sons, Ltd., agreed to employ him for the term mentioned at \$5,000 per annum. Connors Bros., Ltd., guaranteed the payment of this salary. Provision was also made in accordance with the option agreement for his salary being raised to \$7,500 if he became manager of two factories in operation at the same time. A

The respondent commenced his duties as manager of the factory in West St. John, and, when the business was transferred to Black's Harbour, he went there, but he was not satisfied. Disputes had arisen between the respondent and the two companies, and finally, by an agreement of Oct. 2, 1926, between the respondent of the first part, Lewis Connors & Sons, Ltd. of the second part, Connors Bros., Ltd. of the third part, and the two McLeans of the fourth part, the respondent sold his remaining 172 shares of the capital stock of Lewis Connors & Sons, Ltd. to Connors Bros., Ltd. for \$11,416, and his employment agreement was ended by mutual consent. By cl. 3 it was provided as follows : B C D

The party of the first part also agrees with the said parties of the second and third parts that he will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada or directly or indirectly use the brands of either Connors Bros., Ltd., or Lewis Connors & Sons, Ltd., in the Dominion of Canada or elsewhere, nor for a period of 10 years from Apr. 30, A.D. 1925, use the name of Connors in connection with sardine business in any country whatsoever. E

The date from which the period was to run was, it will be noticed, the same date as that mentioned in the agreement of June 9, 1925. Clause 5 provided as follows :

The parties of the second, third and fourth parts hereby release the said party of the first part [Bernard Connors] from all claims and demands of every nature and description which they or either of them have or which hereafter they or either of them may have against the party of the first part by reason of anything to the date of these presents including but without limiting the generality of the foregoing any claims by reason of any shortage in inventory alleged misrepresentation or for alleged improper conduct of the party of the first part in connection with the business of the said Lewis Connors & Sons, Ltd., or the purchase of an interest therein or stock thereof. F G

It will be convenient to mention here that in the opinion of their Lordships the option agreement and the two agreements of June 9, 1925, have, for the present purpose, to be read together as constituting the transaction which has to be considered in deciding whether the covenant by the respondent with Connors Bros., Ltd., contained in the first agreement of June 9, 1925, is enforceable. As was observed in the judgment of KERWIN, J., it is clear that it was not intended by the agreement of Oct. 2, 1926, to release the respondent from that covenant, since, apart from the words " by reason of anything to the date of these H

presents", which are sufficient to safeguard the future rights of the covenantees, the covenant was re-inserted in identical terms, with the same date from which the last part of the covenant was to run, which was contained in the previous covenant.

The position, therefore, in effect was this. The respondent and his father Lewis Connors, being in a position to sell a controlling interest in Lewis Connors & Sons, Ltd., and being the managers of the business of that company, sold that controlling interest to Connors Bros., Ltd., or to the McLeans, who were the managers of Connors Bros., Ltd., and the principal stockholders in it. Lewis and Bernard Connors and their associates obtained a large stockholding interest in Connors Bros., Ltd., and they and other stockholders in Lewis Connors & Sons, Ltd., were to be entitled to sell their remaining holdings to Connors Bros., Ltd., at a price which was proved to be above the market values, and, until sale, were to continue to act as directors of Lewis Connors & Sons, Ltd. Bernard Connors was given a position as manager at a salary for a period of 5 years. The two McLeans and the two Connors agreed "to work for the benefit of the stockholders of the two companies." The respondent and Lewis Connors entered into the restrictive covenant with Connors Bros., Ltd., above set out. The precise terms of it will be considered later. Having regard to the previous history as above stated, and to the fact that the name of Connors could be used by Lewis Connors and the respondent, if they were left to compete in the sardine business with Lewis Connors & Sons, Ltd., it can hardly be doubted that this covenant was an essential feature of the transaction, and that, if it had not been entered into, the McLeans and Connors Bros., Ltd., would have refused to enter into this business arrangement. The cut-throat competition would then have continued in all probability until Lewis Connors & Sons, Ltd., had been driven into liquidation.

Lewis Connors died in 1934, and the period of 10 years from Apr. 30, 1925, mentioned in the 3 covenants expired a year later. The respondent in the meantime had been carrying on a fish business under the name of "The B. Connors Fish Co." It dealt with a number of products, but not with sardines. Lewis Connors & Sons, Ltd., continued to carry on its business, of which the packing and selling of sardines was much the more important part. Connors Bros., Ltd., continued to carry on its similar business. In 1936, the total sales of the two companies exceeded \$1,500,000. In the following year, the respondent wrote to Connors Bros., Ltd., stating that he did not consider himself bound by the provisions of the covenants, since they were in restraint of trade, and he stated that he desired to engage in, and work at, the sardine business in Canada and elsewhere, and that he also desired to use the name of Connors, if he so chose, in connection with the sardine business in Canada and elsewhere. He went on to explain that he desired to ascertain his legal position before making plans for, or investing capital in, such a business. He received a reply from the

solicitors of Connors Bros., Ltd., and Lewis Connors & Sons, Ltd., to the effect that their clients considered the provisions binding, and had no intention of abandoning their rights.

The respondent commenced these proceedings by originating summons on Apr. 27, 1937, and propounded the following questions for the determination of the court:—

(a) Whether, upon construction of the provision written variously in the said agreements as "will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada" and "will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada," the said Bernard Connors, the covenantor mentioned in both agreements, is at the present time and shall be thenceforward barred from engaging in the sardine business in Canada as owner by himself or in partnership with others of such a business or as a shareholder of an incorporated company engaged in such business in Canada.

(b) Whether, upon construction of the words "will not directly or indirectly engage in" used in said covenants the said Bernard Connors is barred at law from working at the sardine business in Canada as an employee of any person, persons, firm or corporations engaged in the sardine business in Canada.

(c) Whether, upon construction of the said covenants and particularly the following words contained therein "nor for a period of 10 years from Apr. 30, A.D. 1925, use the name of Connors in connection with the sardine business in any country whatsoever," the said Bernard Connors may at this time and thenceforward lawfully use the name of "Connors" in connection with the sardine business of Canada.

By his judgment, BAXTER, C.J., determined that question (a) should be answered in the affirmative and question (c) in the negative. He declined, in the exercise of his discretion, to answer question (b), for reasons which he stated and which appear to their Lordships to be entirely satisfactory. The judges of the Appeal Division affirmed his order on all 3 points. In the Supreme Court of Canada, the appeal was allowed by a majority, and it was declared that the covenant in question:

... in so far as it prohibits the appellant [the present respondent] from engaging directly or indirectly in any sardine business whatsoever in the Dominion of Canada [was unenforceable].

It will be convenient here to restate the covenant of June 9, 1925, dividing the material portion into three parts for the purpose of appreciating the position. The said Lewis Connors and Bernard Connors agree with the said Connors Bros., Ltd., that (i) they will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada, (ii) nor directly or indirectly use the brands of either Connors Bros., Ltd., or Lewis Connors & Sons, Ltd., in the Dominion of Canada or elsewhere, (iii) nor for a period of 10 years from Apr. 30, 1925, use the name of Connors in connection with the sardine business in any country whatsoever. In the opinion of their Lordships, these three parts of the covenant relate to widely different matters, and are clearly severable. The first part is *prima facie* in restraint of trade in the ordinary sense. The second part appears to restrain a fraudulent or dishonest use of brands belonging to the covenantees. No question seems to be asked in relation to it. The third part, unlike the other two, is limited in time but unrestricted in space, and relates to the use by the

respondent of his name in connection with the sardine business. Difficult questions might have arisen in relation to this part of the covenant, but the 10 years had expired before the summons was issued, and it seems to their Lordships that question (c), in view of that fact, did not call for a judicial answer, since it had ceased to be of practical importance.

- A There remains question (a) which relates to the first part of the covenant. The question is whether the respondent is barred from engaging in the sardine business in Canada (i) as owner by himself, or (ii) in partnership with others, or (iii) as a shareholder of an incorporated company engaged in such a business in Canada. However, the relevant words of the
- B covenant are "will not directly or indirectly engage in any other sardine business," and the holding of shares is not mentioned. This is another illustration of the inconvenience which attends the answering of theoretical questions in a case of this kind. It appears clear that a small holding of shares in a company carrying on a sardine business in Canada,
- C perhaps only as a part of its undertaking, would not be covered by the words "engage in" a sardine business. On the other hand, a man might well be held to be engaging in such a business if he held a controlling interest in a company formed to carry on a sardine business. Much would depend on the particular circumstances of the case. It seems
- D to their Lordships that it would be wrong to answer question (a) as it stands in the affirmative without qualification, for, whatever view may be taken as to the covenant not to engage in a sardine business in Canada, it cannot safely be declared that a shareholding in a company carrying on such business is necessarily a breach of the covenant. Their
- E Lordships are accordingly left with the question whether the first two parts of the covenant preclude the respondent from engaging in such a business in Canada as owner or partner, or whether it is not enforceable.

- In the view of their Lordships, the phrase "directly or indirectly
- F engage in the sardine business" is not void for uncertainty. Such words found in like covenants have not infrequently been enforced in this country. It may be difficult to assign by way of definition exact limits to their operation, and in some cases it may not be easy to draw the line. The same observation might be made as to such well-known
- G words, for example, as "negligence" or "nuisance." In actual practice, however, and in concrete cases, where all the circumstances have been placed before the court, it is seldom that any difficulty is experienced in determining whether or not the alleged breach is within the meaning of such a covenant. The covenant was alleged to be one which the courts
- H should not enforce because it was in restraint of trade, and, therefore, contrary to public policy. There have been many statements of the general rule during the last 30 years, and their Lordships do not propose to add to their number, for every alteration of language is apt to be treated as if some slight difference in the rule or in its application were intended.

The principles now well-established cannot be better stated than in the often-quoted passage from the judgment of the Board delivered by LORD PARKER in *A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., Ltd.* (1), at p. 795 :

Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. The existing law on the point is laid down in the case of *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co.* (2). For a contract in restraint of trade to be enforceable in a court of law or equity, the restraint, whether it be a partial or general restraint, must (to use the language of LORD MACNAGHTEN, evidently adapted from that of TINDAL, C.J., in *Horner v. Graves* (3)) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public.

It should be observed that in this statement there is no attempt to limit or define the cases in which the community is "equally interested in maintaining freedom of contract within reasonable limits." The same remark is true as regards the proposition stated by LORD MACMILLAN in delivering the judgment of the Board in *Vancouver Malt & Sake Brewing Co., Ltd. v. Vancouver Breweries, Ltd.* (4), at p. 189 :

The law does not condemn every covenant which is in restraint of trade, for it recognises that in certain cases it may be legitimate, and indeed beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser.

The cases which have most often come before the courts have been those connected with the sale of a goodwill and those of master and servant, and the wide differences between these two categories from the point of view of restraint of trade have repeatedly been pointed out : *Mason v. Provident Clothing & Supply Co., Ltd.* (5), at pp. 731, 738, *Herbert Morris, Ltd. v. Saxelby* (6), at pp. 701, 708, 709, and ANSON'S LAW OF CONTRACT, 18th Edn., pp. 236, 237. Their Lordships are not here concerned to deal with cases in the second category. With regard to those in the first, it is plain that considerations which apply in such cases will often be applicable with necessary modifications to a case in which the goodwill sold is the property of a limited company. A covenant by such a company not to compete with the purchaser would in general be useless as a protection, for the company would in due course be wound up, and the most serious competition might be expected to come from those who had been actively engaged in managing and carrying on its affairs. The necessary capital might be supplied out of the price paid by the purchaser.

To take a simple case, if the managing director of a private company, owning all or the great majority of its shares, desires to effect a sale by

the company of the whole undertaking and is willing, in order that a better price may be obtained, to enter into a reasonable covenant restrictive of his activities as regards carrying on such a business in the future, it is difficult to see why public policy should intervene, for, though public policy requires that trading should be encouraged, and that

A trade should, as far as possible, be free, on the other hand, there would be a restriction on this freedom if the person in control of a company owning a business was not able to enter into such a contract as would enable him to obtain the full benefit of the proposed sale. As LORD WATSON observed in *Nordenfelt v. Maxim Nordenfelt Guns & Ammunition Co. (2)*, at p. 552 :

... it is now generally conceded that it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. . . . Accordingly it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect

C of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced.

That this principle is applicable even in the case of an important public company where the covenant is entered into by a managing director holding shares in the company is evident from the facts of the case

D from which that passage is taken, for LORD HERSCHELL (at p. 541), LORD WATSON (at p. 551), LORD ASHBOURNE (at p. 555) and LORD MACNAGHTEN (at p. 560) found no difficulty in holding that the case must be treated on precisely the same footing as if the covenant had been entered into by Nordenfelt in connection with the direct sale of the

E goodwill of his business.

This being accepted in the case of the sale of the business of a company and of a covenant entered into upon such a sale by a person who does not own the goodwill or any other assets of the company (which was the case of *Nordenfelt*), the same result may well follow in a case where,

F instead of selling the undertaking, the shares or stock of the company or a large interest therein is being sold, and one or more of the directors or managers of the company, being interested in the sale, are willing, in order to enable the transaction to go through, or to obtain a better price, to enter into restrictive covenants with the purchaser. Every

G such case must depend on the surrounding facts and circumstances, and their Lordships do not propose to lay down a general rule, but there are many cases of that character in which, as it seems to them, the principles above referred to will apply, and where, in other words, the community is as interested in maintaining freedom of contract within

H reasonable limits as it is in maintaining freedom of trade: *A.-G. of Commonwealth of Australia v. Adelaide S.S. Co., Ltd.* (1), at p. 795. On the whole, and with the greatest respect to SIR LYMAN DUFF, C.J., their Lordships are of opinion that this case, for the present purpose, must be treated as governed by the same principle as that which would have applied if the respondent had himself been selling the goodwill of the

business of Lewis Connors & Sons, Ltd. Nor can they accept the view that the real purpose of the transaction was to obtain a monopoly in the business of Canadian sardines. They see no sufficient ground for differing from the view, which must apparently have been held by all the other judges in Canada, that the McLeans, the controlling shareholders in Connors Bros., Ltd., taught by an unhappy experience in the past, were seeking to obtain covenants from the two Connors, who had been controlling and managing the business of Lewis Connors & Sons, Ltd., which would prevent those persons from gravely depreciating the value of the large stockholdings in that company which were being purchased at a full price.

There remain two questions. The first is whether the covenant was reasonably necessary for the protection of the goodwill of the business of Lewis Connors & Sons, Ltd., for, if the restraint was larger than was necessary for that protection, it could be of no benefit to either party, and would be regarded in the eye of the law as oppressive, and, therefore, unenforceable. The second is whether the covenant is "consistent with the interests of the public": *McEllistrim v. Ballymacelligott Co-operative Agricultural & Dairy Society* (7), at p. 562.

In the opinion of SIR LYMAN DUFF, C.J., and DAVIS and HUDSON, JJ., the former question was the main question in the case, and they agreed in answering that the restraint was not reasonable as between the parties. BAXTER, C.J., the judges of the Appeal Division and KERWIN and CROCKETT, JJ., in the Supreme Court of Canada, took the other view. The majority in that court may, perhaps, have placed too heavy an onus on the appellants. In *Herbert Morris, Ltd. v. Saxelby* (6), LORD PARKER remarked as follows, at p. 706:

It is not that such restraints [on trade] must of themselves necessarily operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of proving such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or another.

In this part of his opinion, LORD PARKER was stating the effect of the judgment of LORD MACNAGHTEN in the *Nordenfelt* case (2). If, however, that judgment be referred to, it will be seen that LORD MACNAGHTEN, in citing the decision of LORD LANGDALE in *Whittaker v. Howe* (8), said distinctly that, on the facts of that case, it lay on the defendant to prove that the area of restriction was unreasonable ([1894] A.C., at p. 573). This, indeed, was only following the opinion expressed by the Court of Queen's Bench in *Tallis v. Tallis* (9), at p. 412, in an action relating to a covenant by a retiring partner, and in a number of other cases, of which *Rousillon v. Rousillon* (10), at p. 365, is one example. It is possible that, in a case where a goodwill is being sold by a covenantor, the rule as to onus of proof of special circumstances may require further elucidation. The persons who have actively been concerned in the

management of a business have sometimes had a knowledge of its trade secrets, and have often become acquainted with its trade connection. In such cases, it may be *prima facie* reasonable that the purchasers should insist on a covenant or covenants which will enable them to obtain the full benefit of the goodwill which they are purchasing, and, if a company happens to be the owner, it is only from individuals that useful covenants can be obtained: SMITH'S LEADING CASES, 13th Edn., Vol. I, p. 481. Their Lordships, however, are referring to this matter of onus only to show that they regard it as one worthy of consideration on some future occasion, and they propose to deal with the present case as if the covenantees were called upon to prove all the special circumstances.

The unusual way in which the question was raised before the court must be remembered. The respondent was the first witness called, and, in cross-examination, he said with regard to the old company whose business was acquired by Connors Bros., Ltd., that he thought that that company was carrying on business in every province in Canada. Asked as to the business of Lewis Connors & Sons, Ltd., he said in cross-examination:

I think perhaps they were selling some [cases of sardines] in pretty near every province in Canada.

Neil McLean, whose evidence was plainly accepted by the trial judge, gave evidence as to the businesses of Connors Bros., Ltd., and Lewis Connors & Sons, Ltd., while they were engaged in severe competition everywhere, but it was never suggested to him in cross-examination that the business of either company did not extend over all Canada. In truth, counsel for the respondent was not endeavouring to establish such a proposition. A clerk in charge of the export department, J. J. Hayes Doone, proved that, when the old company sold its business to Connors Bros., Ltd., they were selling in all provinces in Canada, as well as elsewhere, and it was assumed that Lewis Connors & Sons, Ltd., competed with Connors Bros., Ltd., throughout Canada. Burton M. Hill, a director of Connors Bros., Ltd., gave evidence. The first question put to him in cross-examination elicited this answer:

Connors was known from one end of Canada to the other in the sardine business and it was the only Canadian company well-known.

This answer may have been ambiguous, but, instead of making the point, if it could be made, that Lewis Connors & Sons, Ltd., were not in 1925 carrying on business all over Canada, the cross-examination proceeds thus:

It was also known all over the world?—No. A certain number of countries. We have had evidence here that this company does a world-wide business?—It does now.

We also have evidence that it did then.—In a number of countries.

There is not a single question by counsel for the respondent which even remotely suggests that the two companies in the period up to May, 1925, were not carrying on business in competition throughout Canada, and it would seem, taking the evidence as a whole, that this was in effect an admitted fact. It is important to note that the business of

Lewis Connors & Sons, Ltd., like that of Connors Bros., Ltd., was a wholesale one. Cases of sardines sold in a province of Canada would presumably find their way into the Yukon Territory and the North-West Territory. Their Lordships do not take the view that the evidence is of a very satisfactory kind, but, read as a whole, they are of opinion that BAXTER, C.J., was justified in coming to the conclusion, which he apparently did without difficulty, that Lewis Connors & Sons, Ltd., had carried on the sardine business in each of the provinces of Canada. No point as to the Territories was made until the matter reached the Supreme Court of Canada, and the answer to that point, if it had been made, has been suggested above.

It should also be observed that, the question of reasonableness being a matter of law for the court, it has never yet been supposed that it is necessary in relation to the trade of a large manufacturer or merchant to prove to the satisfaction of the court that the business which the covenant is designed to protect has been carried on in every part of the area mentioned in the covenant. In the cases in which the area has been the whole of England, or a substantial part of it, such as 100 miles or 150 miles from a named town, it has never been held that the covenantee was under an obligation to prove that the business has been carried on in all the towns and villages within the area. In the *Nordenfelt* case (2), no attempt was made to prove that all the governments of the world, or even of the civilised world, had ordered goods from the company, though the greater number no doubt had done so. A great deal no doubt depends on the nature of the business and the area in question. In a country of vast spaces, like the Dominion of Canada, it will always be possible, until the population of the country reaches a point now scarcely contemplated, to point to areas where there are only few settlers or inhabitants, and where, accordingly, few, if any, of the goods sold by the manufacturer have penetrated. If, for example, a restrictive covenant were limited to the province of Quebec, it would seldom be possible to prove that the goods were used in every part of that province. However, the goodwill of a business such as is now under consideration could not adequately be protected if the restrictive covenant had to be limited to the towns and villages where actual sales could be proved, whilst leaving the vendor free to establish a business, which would almost certainly be competitive, in all the adjoining places.

It may be useful to cite in this connection the words of LORD PARKER in *Herbert Morris, Ltd. v. Saxelby* (6), at p. 708 :

The goodwill of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and if the purchaser is to take over such goodwill with all its advantages it must, in his hands, remain similarly immune. Without, therefore, a covenant on the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell. The covenant against competition is, therefore, reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser.

The words "in all probability" are important, for the question of law

as to reasonableness does depend on probability. On a careful consideration of all the circumstances, their Lordships have decided that the right conclusion is that the covenant, so far as space is concerned, was not unreasonable.

A If the restriction as to space is considered to be reasonable, it is seldom in a case where the sale of a goodwill is concerned that the restriction can be held to be unreasonable because there is no limit as to time. Their Lordships accept as correct the statement by LORD CAVE in *Fitch v. Dewes* (11), at p. 168 :

B . . . it has been settled (I think) since *Hitchcock v. Coker* (12), that where there is a goodwill to be protected, a covenant in restraint of trade, even when imposed as a condition of employment, may be so framed as to give adequate protection not only to the covenantee himself but also to his successors in the business, and this although it may be necessary for that purpose to impose a restriction upon the covenantor for the remainder of his life.

C The question whether the restraint ought to be held to be injurious to the public can be briefly dealt with. It would appear that what is meant by the affirmative proposition is that the restriction is calculated to produce a pernicious monopoly—that is to say, a monopoly calculated to enhance prices to an unreasonable extent: *Nordenfelt's* case (2), at pp. 630, 646, 668, and *Adelaide S.S. Co.* case (1), at p. 796. It is well-settled that the onus of establishing such a proposition is upon the party who attacks the covenant. When the court is satisfied that the restraint is reasonable as between the parties, it must always be very difficult to prove in a case connected with goodwill that the public interest is affected: *Herbert Morris, Ltd. v. Saxelby* (6), at pp. 700, 708.

E In the present case, it seems to their Lordships that there are no grounds for holding that a restriction restraining the respondent from carrying on a sardine business in Canada is likely to produce a real monopoly, since every other person in Canada can set up such a business, and the evidence is to the effect that some persons have done so. The practical

F difficulty in successfully competing with the appellants may well be due to their skill and enterprise and long experience. This point, therefore, also fails.

The conclusion, therefore, must be that the covenant by Bernard Connors with Connors Bros., Ltd., contained in the agreement of June 9, 1925, is binding as being a reasonable protection of the shares purchased by Connors Bros., Ltd., in Lewis Connors & Sons, Ltd. In the result, their Lordships are of opinion that the three questions raised by the originating summons should be dealt with as follows. Question (a) should be answered by a declaration that the respondent is at the present time, and will henceforward be, barred from engaging in the sardine business in Canada as owner by himself or in partnership with others. No answer should be given to that part of the question relating to the holding of shares in an incorporated company carrying on such a business. Nor should any answer be given to questions (b) and (c). Their Lordships, for the above reasons, will humbly advise His Majesty that the appeal

should be allowed to the extent above mentioned, and that the respondent should be ordered to pay to the appellants their costs here and below.

Appeal allowed with costs in all courts.

Solicitors: *Norton, Rose, Greenwell & Co.* (for the appellants).

[Reported by CHARLES SHELLEY, ESQ., *Barrister-at-Law.*]

A

BENABO v. WILLIAM JAY & PARTNERS, LTD.

[CHANCERY DIVISION (Morton, J.), **September 20, 1940.**]

B

Execution—Company—Writ of attachment against directors—Indorsement of order served on company—R.S.C., Ord. 42, r. 31.

The defendant company collected the rents of certain properties as agents of the plaintiffs. There were two directors of the company, J. and H., and, on account of the latter's participation in civil defence services, the company were obliged to employ a clerk to collect the rents on their behalf, but, owing to the clerk's defalcations, the moneys were never paid into the company's banking account. The plaintiffs did not receive proper accounts from the defendant company, and so issued a writ on Feb. 23, 1940, claiming an account of the rents and profits received. On Mar. 19, 1940, they obtained an order for an account. On July 3, 1940, an order was made that the defendant company should pay into court £118 17s. 8d. on or before July 17, 1940. The defendant company failed to pay the money into court, and the plaintiffs accordingly served the order on them at the company's registered office, the order being indorsed as follows: "If you, William Aries Justice and James Sydney Herbert, directors of the within named William Jay & Partners, Ltd., neglect to obey this order by the time therein limited you will be liable to process of execution for the purpose of compelling you to obey the same order." The order was not obeyed. The plaintiffs also asked for leave under R.S.C., Ord. 42, r. 31, to issue a writ of attachment against the two directors, J. and H., for non-compliance with the order:—

C

D

E

HELD: the order on the company was not properly indorsed as required by R.S.C., Ord. 41, r. 5. As it appeared from the evidence of the directors that the objection to the issue of the writ of attachment was not merely a technical one, and as the remedy under R.S.C., Ord. 42, r. 31, was in the discretion of the court, the writ must be refused.

F

[EDITORIAL NOTE.] A judgment against a company or corporate body can be enforced by the usual processes of execution, and, where a judgment or order has been wilfully disobeyed, the court may, in its discretion, enforce the order by a writ of sequestration against the corporate property, or by a writ of attachment against the directors. The latter remedies are additional ones and will only be granted by the court where the circumstances of the case render recourse to them necessary in order that justice may be done. This being their nature, the court requires that all the formalities for the protection of the directors of a company shall be strictly observed.

G

AS TO ATTACHMENT AGAINST DIRECTORS OF COMPANY, see HALSBURY, *Hailsham Edn.*, Vol. 7, p. 31, para. 43; and FOR CASES, see DIGEST, Vol. 13, pp. 426-428, Nos. 1490-1513. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 778-780.]

H

Cases referred to:

- (1) *Iberian Trust, Ltd. v. Founders Trust & Investment Co., Ltd.*, [1932] 2 K.B. 87; Digest Supp.; 101 L.J.K.B. 701; 147 L.T. 399.

(2) *McKeown v. Joint Stock Institute, Ltd.*, [1899] 1 Ch. 671; 13 Digest 426, 1493; 68 L.J.Ch. 390; 80 L.T. 641.

A MOTION by the plaintiffs, under R.S.C., Ord. 42, r. 31, that they may be at liberty to issue a writ or writs of attachment against the directors of the defendant company for the contempt of the defendant company in not lodging in court, as directed in the schedule thereto, the sum of £118 17s. 8d., in the hands of the defendant company as agent and trustee for the plaintiffs pursuant to the order in that behalf in this action, dated July 3, 1940. The facts are fully set out in the judgment.

B *A. de W. Mulligan* for the plaintiffs.

B. F. Mendel for the defendants.

C MORTON, J.: The facts are that Justice and Herbert are the directors of the defendant company, and I think that it is sufficiently clear from the evidence that they are the only directors. On July 3, 1940, an order was made in the following terms:

It is ordered that the defendants on or before July 17, 1940, or subsequently within 4 days after service upon them of this order lodge in court as directed in the schedule hereto the sum of £118 17s. 8d. shown by the account being the exhibit "W. A. J." to the said affidavit of William Aries Justice to be in the hands of the defendants.

D That order was not complied with, and on Aug. 19, 1940, process was served on Justice and on Herbert with the order at the registered office of the defendant company at 7A, High Street, Market Square, Staines, Middlesex, and the process server also produced and showed to Justice and Herbert respectively a duplicate of the order duly passed and entered. Para. 2 of the process server's affidavit provides as follows:

E Each copy of the said order so served as aforesaid had indorsed thereon at the time of the aforesaid services a memorandum in the words following that is to say: "If you, William Aries Justice and James Sydney Herbert, directors of the within named William Jay & Partners, Ltd., neglect to obey this order by the time therein limited you will be liable to process of execution for the purpose of compelling you to obey the same order."

F That order was not complied with, and the notice of motion now before me, dated Aug. 30, 1940, was served on William Aries Justice, on James Sydney Herbert, and on F. Bernard Smith, the defendants' solicitor. I have before me affidavits by Justice and Herbert as to their means. G Counsel for the defendants takes five points, and on one or more of these points he claims that this motion should be dismissed. The first point is that the company has never been served with the order of July 3, 1940, and that, therefore, the 4 days have not expired. In my view, that point is not well-founded. The Companies Act, 1929, s. 370 (1), H provides as follows:

A document may be served on a company by leaving it at or sending it by post to the registered office of the company.

The document in question was left at the registered office of the company, and, if the indorsement had been in proper form, which, in my opinion, it was not, it would have been held to have been properly served.

The second point is that the indorsement is wrong and does not comply with the provisions of R.S.C., Ord. 41, r. 5, which provides as follows :

Every judgment or order made in any cause or matter requiring any person to do an act thereby ordered shall state the time, or the time after service of the judgment or order, within which the act is to be done, and upon the copy of the judgment or order which shall be served upon the person required to obey the same there shall be indorsed a memorandum in the words or to the effect following, viz. : " If you, the within named A. B., neglect to obey this judgment [*or order*] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [*or order*]." A

In the present case, the order served at the registered office was not so indorsed. The matter would appear at first sight to be a purely technical one, but I do not think that it is. In the first place, it is provided by R.S.C., Ord. 42, r. 31, as follows : B

Any judgment or order against a corporation wilfully disobeyed may, by leave of the court or a judge, be enforced by sequestration against the corporate property, or by attachment against the directors or other officers thereof, or by writ of sequestration against their property. C

It is under that rule that this present application is made, and it was held by LUXMOORE, J., in *Iberian Trust, Ltd. v. Founders Trust & Investment Co., Ltd.* (1), at p. 88 :

... the remedy against a director of a company by attachment given by R.S.C., Ord. 42, r. 31, was an alternative remedy, and the plaintiff company could not pursue that remedy unless they were also in a position to proceed against the defendant company, and that they could not do because the copy of the order served upon the defendant company did not comply with R.S.C., Ord. 41, r. 5. D

If the order had been indorsed in proper form and properly served, and if the plaintiffs could show that the defendants had wilfully disobeyed it, they would have had two alternative remedies—namely, either a writ of sequestration against the company or a writ of attachment against the directors. In my view, they are not in a position to pursue either remedy. It is not wholly a technical point, which fact is explained by the evidence of the directors. On the question of wilful disobedience—namely, whether or not the company has actually refused to pay this money into court—Justice and Herbert in their affidavits not unnaturally devoted themselves to explaining their own personal positions, and it explains why this is not a purely technical point. Counsel for the plaintiffs refers me to *McKeown v. Joint Stock Institute, Ltd.* (2). Unfortunately, it does not appear from the report of that case what was the precise form of the indorsement. That case only decides that an order for attachment will not be issued against a director until he has been personally served with the order which has been disobeyed. E F G

The third point of counsel for the defendants is that wilful disobedience by the company is not shown. The affidavits of Justice and Herbert do not show whether or not the company had ever received the money. The fourth point is that R.S.C., Ord. 42, r. 31, is not directed to payment of money by a company at all. It is unnecessary for me to express H

any view on that. As to the fifth point, I may add that the remedy under R.S.C., Ord. 42, r. 31, is a discretionary one, and, even if the formalities had been complied with, I doubt whether I would have exercised it. However, I express no view, one way or the other.

Motion dismissed with costs.

A Solicitors: *Brundrett, Randall & Whitmore* (for the plaintiffs);
F. Bernard Smith (for the defendants).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

B HARRY PARKER, LTD. v. MASON.

[COURT OF APPEAL (MacKinnon, Luxmoore and du Parcq, L.JJ.),
July 16, 17, 18, 19, 22, August 1, 1940.]

C *Contract—Illegality—Enforcement of illegal contract—Money received by agent under illegal contract—Right of principal to recover.*

A principal paid a sum of money to an agent in pursuance of an illegal contract and on certain representations which proved to be false. The agent failed to apply the money in accordance with the terms of the contract, and the principal, in an action against the agent, claimed to recover that sum as money had and received to his use, or, alternatively, as damages for fraudulent misrepresentation:—

D HELD: there is no difference in principle between the case of a principal who is seeking to recover money handed to an agent for an illegal purpose and that of one principal seeking to recover money paid by him to another principal in pursuance of an illegal contract. In either case, the rule *ex turpi causa non oritur actio* applies, and the court will not assist the parties to such a contract.

E [EDITORIAL NOTE. No action can be brought for the purpose of enforcing an illegal contract, either directly or indirectly, or of recovering a share of the proceeds of an illegal transaction, by any of the parties to it. Where the object of a contract is illegal, the whole transaction is tainted with illegality, and no right of action exists in respect of anything arising out of the transaction. Until the decision in this case, it had not been expressly decided that the above principle applied to an illegal transaction as between a principal and his agent, but the judgments herein show that the rule *ex turpi causa non oritur actio* applies equally to the case of a principal seeking to recover money paid to his agent in pursuance of an illegal contract as to that of a principal seeking to recover money from another principal in the same circumstances.

G AS TO RECOVERY OF MONEY WHERE CONTRACT ILLEGAL, see HALSBURY, Hailsham Edn., Vol. 7, pp. 173, 174, para. 248; and FOR CASES, see DIGEST, Vol. 12, pp. 277-289, Nos. 2275-2375.]

Case referred to:

- H (1) *Holman v. Johnson* (1775), 1 Cowp. 341; 12 Digest 279, 2288.
(2) *Hastelow v. Jackson* (1828), 8 B. & C. 221; 25 Digest 406, 95; 6 L.J.O.S.K.B. 318.
(3) *Taylor v. Bowers* (1876), 1 Q.B.D. 291; 12 Digest 283, 2319; 46 L.J.Q.B. 39; 34 L.T. 938.
(4) *Scott v. Brown, Doering, McNab & Co., Slaughter & May v. Brown, Doering, McNab & Co.*, [1892] 2 Q.B. 724; 12 Digest 238, 1959; 61 L.J.Q.B. 738; 67 L.T. 782.

- (5) *Sinclair v. Brougham*, [1914] A.C. 398; 12 Digest 282, 2317; 83 L.J.Ch. 465; 111 L.T. 1; *affg.* S.C. *sub nom. Re Birkbeck Permanent Benefit Building Society*, [1912] 2 Ch. 183.
- (6) *Harse v. Pearl Life Assurance Co.*, [1904] 1 K.B. 558; 12 Digest 287, 2356; 73 L.J.K.B. 373; 90 L.T. 245.
- (7) *Sykes v. Beadon* (1879), 11 Ch.D. 170; 12 Digest 280, 2300; 48 L.J.Ch. 522; 40 L.T. 243.

APPEAL on a counterclaim by the defendant Mason from two judgments of STABLE, J., dated respectively Apr. 23, 1940, and May 9, 1940, dismissing his counterclaim for a sum of £11,875 from the plaintiff company, Harry Parker, Ltd., bookmakers, and from Abraham Stein, otherwise known as Harry Parker. The plaintiffs' claim, which was for a sum of £8,100 on an account stated, was manifestly in respect of betting debts, and was not proceeded with, the hearing being concerned with the counterclaim only. The sum of £11,875 was paid by the defendant in respect of a bet of £6,000 each way on a racehorse named Another Greek. The defendant alleged that Parker promised, first, that, if he would give Parker a commission of £6,000 each way on this horse, Parker would place £6,000 with street bookmakers by means of an organisation of boys on bicycles, secondly, that Parker would place the remaining £6,000 with bookmakers in other parts of the country, thirdly, that Parker would so carry out these extensive bets that news of them would not get to the course before the start, so as to affect the starting price unfavourably, and, fourthly, that it was agreed between them that the defendant should attend the race, and, in order to further the advantageous starting price of this horse, which was in fact owned by the defendant, he should ostentatiously make a sham bet with Parker on another horse. The defendant in fact paid £6,000 to Parker before the race, and at Nottingham, where the race was held, made a considerable sham bet with Parker on another horse. Another Greek lost the race, and shortly afterwards the defendant paid Parker a further £6,000, less £125 which Parker owed him on another transaction. By his counterclaim, the defendant claimed to recover the sum so paid to Parker and the company as money had and received to their use, or, alternatively, as damages for fraudulent misrepresentation. Parker, by his defence, admitted that he had no boys on bicycles, that he had not placed £6,000 with street bookmakers, and that he had not placed £6,000 with other bookmakers, but denied that he made the promises or representations, and alleged that the defendant simply made a straight bet each way on Another Greek. The judge found that the representations and promises were made by Parker substantially as alleged by the defendant, and found, in addition, that there was an express bargain between Parker and the defendant that Parker should square the other jockeys in the race. The conclusion in law at which the judge arrived was that, though Parker's fraud had been established, the defendant could not recover the money, since the action originated in a *turpis*

causa, and *ex turpi causa non oritur actio*. He dismissed the counter-claim and ordered each party to pay its own costs. Both parties appealed.

A. T. Miller, K.C., P. B. Morle and E. Ould for the appellant.

Gilbert Beyfus, K.C., and Constantine Gallop for the respondents.

A

MACKINNON, L.J. [read by LUXMOORE, L.J.]: I doubt whether the judge was justified in finding that there was any express bargain between the parties that Parker should square the other jockeys. However, Mason was suing for damages for fraudulent misrepresentation.

B

In considering what Parker did represent, the judge was not only entitled, but was bound, to consider all that Parker represented, and, if, just before the particular interview, Parker did represent that he could square all the jockeys in the race, the judge was entitled to conclude that that was one of the material representations on the strength of which, and in reliance upon which, Mason parted with his money.

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Nor is it surprising that he concluded that Mason did so rely, for such reliance would explain two things which otherwise, upon Mason's story, seem inexplicable. First, if Another Greek's victory was to be assured, one can understand why Mason should risk £12,000 on this inferior

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creature. That his trainer thought well of him does not seem convincing. Secondly, on Mason's story, Parker was to get no remuneration for himself for placing this large sum with other bookmakers, but, if the result was to be a certainty, he could make sure of his own reward. The conclusion in law at which STABLE, J., arrived was that, though

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Parker's fraud was established, Mason could not recover his money. His claim was a *turpis causa*, and *ex turpi causa non oritur actio*. Subject to the qualification I have made above, I think that the judge's conclusions as to the facts were amply justified by the evidence, and I think that his decision as to the law was correct.

F

Quite apart from the question about squaring the jockeys, the bargain proved and relied on by Mason involved two illegalities—namely, (i) that in defiance of the Street Betting Act, 1906, Parker should make bets to the amount of £6,000 with street bookmakers, and (ii) that Parker and Mason conspired to get Mason to make a sham bet on the course to

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deceive the public. I think that those facts would suffice to taint the transaction with illegality, and to disentitle either party to sue the other in a court of law. However, as I have said, I think that the evidence showed that, while Mason's cause of action was for damages for Parker's fraudulent representations, part of those representations,

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and a part on which Mason relied when he paid his money, was that Parker was in a position to square all the competing jockeys in a race, and, if they had in terms agreed that he should do so, this, of course, would have been an illegality for which it would be hard to find a competent epithet.

The rule *ex turpi causa non oritur actio* is, of course, not a matter by

way of defence. One of the earliest and clearest enunciations of it is that of LORD MANSFIELD, C.J., in *Holman v. Johnson* (1), at p. 343 :

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed ; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this ; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes ; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it ; for where both are *equally* in fault, *potior est conditio defendantis*. A B

The court drives both parties from its presence : *procul este, profani !* No judgment will be given, and no order made as to costs.

Counsel for the appellant Mason argued that, as Parker did not carry out the illegal purpose for which he received the money, Mason could claim its return. It is true that in such a case a *locus pœnitentiæ* has been allowed to one of the guilty parties, but to attempt to apply it to this case is to misapprehend the rule. If repentance takes place before the time for performance of the illegal purpose, the penitent may claim the return of his money, but, if, as here, the time for performance has passed, the repentance of one is of no avail, and he cannot claim his money on the ground that his partner in guilt has not in fact performed his promise, but has merely pocketed the money. In truth, it is not necessary to invoke that consideration, for, on his own showing, Mason has, to the best of his ability, carried out his part of the illegal compact by paying £6,000 to be invested with street bookmakers, and by making the illusory bet upon Tuan. Counsel for the appellant also suggested that this rule as to the effect of illegality, applicable as to the parties to a contract tainted with illegality, does not apply when those parties happen to be principal and agent. I think that there is no foundation whatever for the suggestion. C D E F

In the result, I think that this appeal must be dismissed, without costs to either party. G

LUXMOORE, L.J. : The first ground on which counsel for the appellant relied is well-recognised in the books. The *ratio decidendi* of the cases appears to be that public policy is best served by allowing a party to an illegal arrangement to repent before it is too late, and to prevent the completion of the illegal purpose by reclaiming the money paid by him in pursuance of it. Examples of such cases are to be found in *Hastelow v. Jackson* (2) and *Taylor v. Bowers* (3). In the present case, however, the time for the completion of the illegal arrangement had passed long before the claim for repayment was made. Further, Mason has himself long since fulfilled his part of it by payment of the H

whole of the money to the company, and by the making of the fictitious bet with Parker, as STABLE, J., has found he did. There has been no repentance on Mason's part. Indeed, his complaint still is that the money he paid to the company was not employed in furtherance of the scheme for placing the sum of £6,000 with street bookmakers, which
A was illegal, because it is contrary to the provisions of the Street Betting Act, 1906. Further, Mason carried out the other illegality agreed upon—namely, the making of the fictitious bet. That this was an illegal act there can be no doubt. Its avowed object was by means of the pretended bet to keep up the odds on Mason's horse Another Greek by
B reducing those on the horse Mason pretended to back. This seems to constitute a criminal conspiracy in precisely the same way as the arrangement to rig the stock exchange market in respect of shares was held to be in *Scott v. Brown, Docring, McNab & Co.* (4). I am satisfied that the judge was right in holding that Mason had carried out his part of
C the arrangement. Further, so far as the £5,875 is concerned, Mason paid over that sum in the belief that the whole arrangement had been carried out, although, for some reason, his horse had failed to win, and the expected coup was frustrated. This being so, it is impossible to hold that Mason had any *locus pœnitentiæ* after the race at Nottingham had
D been run, and, consequently, he cannot revoke the transaction and recall the money paid.

With regard to the second contention, I can see no difference in principle between the case of a principal seeking to recover money handed to an agent for an illegal purpose and that of one principal
E seeking to recover money paid by him to another principal in pursuance of an illegal contract. In neither case will the court assist the parties, whether the claim be to obtain money paid for an unfulfilled or partly fulfilled illegal purpose or by way of damages for breach of an illegal contract. As LORD MANSFIELD, C.J., pointed out in 1775 in *Holman*
F *v. Johnson* (1), at p. 343, the ground upon which the court acts is not because it wishes to protect the defendant to such a claim, but because it will not lend its aid to the plaintiff. It is merely by accident that the defendant gets the advantage. If the litigants were to change sides, then the advantage would accrue to the one who is defendant, for,
G where both are equally at fault, *potior est conditio defendentis*.

In my judgment, STABLE, J., was right in dismissing this action, leaving each party to bear his own costs. The appeal fails for the same reason—namely, that this court will not assist either party once the illegality of the transaction has been brought to its notice. I agree
H that the appeal must be dismissed without any order being made as to the costs of either party.

DU PARCQ, L.J.: The question now is whether Parker, having dishonestly used the whole of the money for his own purposes, can be compelled by Mason to return it. I have no doubt that, if Mason had

repented, and demanded the return of so much of it as had been paid before the time had come for putting the bargain into effect, he would have been entitled to the advantage of the *locus pœnitentiæ* which the law allows. Here there was no sign of repentance. Indeed, one part of the conspiracy—namely, the fictitious bet—had been completed. In these circumstances, I am of opinion that Mason cannot invoke the assistance of the court to recover his money. Clearly, he cannot ask for damages for breach or non-fulfilment of a contract which, now that all its terms are known, is shown to have been a criminal conspiracy. Nor, in my opinion, is his position any more fortunate when he seeks to recover the money as money had and received to his use. He is then relying on a form of action of which VISCOUNT HALDANE, L.C., said in *Sinclair v. Brougham* (5) that it was [p. 415]:

... in theory based on a contract which is imputed to the defendant by a fiction of law.

Then VISCOUNT HALDANE, L.C., added, at p. 415:

The fiction can only be set up with effect if such a contract would be valid if it really existed.

The fictitious promise in this case is a promise to return money paid for a consideration which has wholly failed. The answer may be made that the consideration only partly failed, because Parker at least gave the necessary collaboration in the fictitious bet. Even if this fact could be ignored, the result would still be that, by a fiction, Parker is to be taken to have said: "I promise you that, if I do not carry out my share in the criminal conspiracy upon which we have embarked, then, when the time for its performance has gone by, I will pay you back your money." Such a promise, if made, would be unenforceable by reason of the general rule which was stated, for instance, by SIR RICHARD HENN COLLINS, M.R., in *Harse v. Pearl Life Assurance Co.* (6), at p. 563:

It is clear law that where one of two parties to an illegal contract pays money to the other, in pursuance of the contract, it cannot be recovered back.

To that rule there are exceptions, one of which I have already mentioned.

It was submitted on Mason's behalf that this case was covered by another exception, which was said to be based on principles of commercial morality. Trusts, and the obligations of agency, said his counsel, are sacred, and nothing must be allowed to prevent the *cestui que trust* or the principal from reclaiming money from a trustee or agent, however tainted the transaction from which the payment of the money flowed may be. In my opinion, a principal seeking to recover from his agent money which he handed to him for an illegal purpose is in no better case, when he seeks relief from a court of law or equity, than the contracting party seeking to recover back payments made by himself to another party to the contract (who is not his agent) for an illegal consideration. In neither case will the courts order the repay-

ment of the money. SIR GEORGE JESSEL, M.R., said in *Sykes v. Beadon* (7), at p. 197 :

It does not follow that you cannot, in some cases, recover money paid over to third persons in pursuance of the contract . . .

A It is not now necessary to say more of the cases to which SIR GEORGE JESSEL, M.R., was alluding than that they certainly do not assist the appellant : see the judgment of SIR GEORGE JESSEL, M.R., at p. 194. No other way of escape from the operation of the rule *ex turpi causa non oritur actio* seems to me to be open to Mason, unless, indeed, as I think was suggested at the bar, it is possible to put his claim on an equitable ground. As to this, I will say only that he seems to me to lack the qualification which is demanded of those who come to equity.

B I agree that the appeal must be dismissed. I assume that Parker, who has no doubt been advised as to the view taken by the courts of this kind of transaction, will not ask for, or expect, an order in his favour as to costs.

Appeal dismissed without costs.

Solicitors : *Harold Eves* (for the appellant) ; *Lieberman, Leigh & Co.* (for the respondents).

[Reported by DEREK H. KITCHIN, ESQ., Barrister-at-Law.]

MERCHANTS' AND MANUFACTURERS' INSURANCE CO. LTD. v. HUNT AND OTHERS.

E [KING'S BENCH DIVISION (Stable, J.), **August 30, September 2, 3, 1940.**]

Insurance—Motor insurance—Proposal—Non-disclosure of material facts—Effect on rights of third parties.

Insurance—Motor insurance—Third-party risks—Action by insurance company for declaration—Clause negating right to declaration—Declaration based on admissions by insured binding on all parties to action—Road Traffic Act, 1934 (c. 50), s. 10 (3).

F By a policy dated Sept. 1, 1938, the plaintiffs insured the defendant C. H. against third-party risks in respect of accidents arising out of the use of his motor car. It was provided by the policy that the truth of the statements and answers in the proposal should be "conditions precedent to any liability of the company to make any payment" under the policy, and also that nothing in the policy should "affect the right of any person indemnified by this policy or of any other person to recover an amount under or by virtue of the Road Traffic Act, 1934, ss. 10, 12. . . ." The proposal form, which was incorporated in the policy, contained, *inter alia*, the following questions and the answers thereto given by C. H. : (1) Have you or any person who to your knowledge will drive the car ever been convicted of an offence in connection with a motor vehicle or motor cycle, or is any prosecution pending ? Answer : No. (2) Will the car be driven by any person under 21 ? Answer : No. Both answers were in fact untrue, since (a) C. H.'s son, J. H., a person who to his knowledge was likely to drive the car, had been convicted of 3 motoring offences and (b) J. H. was then only 17 years of age and had held a licence for only 6 months. Two persons were injured as a result of a collision with the car when it was being driven by J. H. and brought an action for damages against C. H. and

J. H. The plaintiff company then claimed for a declaration under the Road Traffic Act, 1934, s. 10 (3) that they were entitled to avoid the policy on the ground that it was obtained by non-disclosure of material facts. The evidence in support of the claim for a declaration consisted solely of admissions by C. H. and J. H. :—

HELD : (i) if a proposer for an insurance gives an unqualified negative answer to a question, that answer is an assertion, first, that he has the knowledge which he purports to impart, and, secondly, that that knowledge is what he is imparting. Such an answer will not be construed as being true to the best of his knowledge and belief.

(ii) the answer to the questions were material matters as a result of which the policy was obtained.

(iii) although the plaintiff company had established their right to the declaration which they sought, they had expressly contracted themselves out of that right by the terms of the policy which they had issued and the action accordingly failed.

(iv) in this action, the admissions of C. H. and J. H., though strictly only evidence against themselves, could be made the basis of a declaration which would be binding on all parties to the action.

[EDITORIAL NOTE. Answers to questions in proposal forms for an insurance policy are generally given to the best of the knowledge and belief of the applicant for insurance. The decision herein shows that such answers should be given in a qualified form and not be just a plain affirmative or negative. If an unqualified answer is given, the proposer will be held to the strict accuracy of his reply. An insurance company is made liable to pay the injured party any damages he has recovered in an action unless the company within the time limited by the Act obtains a declaration of non-liability. It is here shown that the company may by a suitable clause negative its right to such a declaration. This result is a fortunate one, since the rights of the injured party may sometimes be defeated by a false statement made by the insured in the proposal form.

AS TO DECLARATION THAT POLICY AVOIDED, see HALSBURY, Hailsham Edn., Vol. 18, pp. 564, 565, para. 914 ; and FOR CASES, see DIGEST SUPP., Insurance, Nos. 3217 gg-3217 kk.]

Case referred to :

(1) *Zurich General Insurance Co. v. Livingstone*, [1940] S.C. 406.

ACTION for a declaration under the Road Traffic Act, 1934, s. 10 (3), that the plaintiffs are entitled to avoid a policy of insurance issued to Charles Hunt, the first defendant, and dated Sept. 5, 1938, on the ground that the policy was obtained by the non-disclosure of material facts or by representations of fact which were false in some material particular. The facts are fully set out in the judgment.

H. D. Samuels, K.C., and *Montague Berryman* for the plaintiffs.

Gerald A. Thesiger for the first and second defendants.

D. N. Pritt, K.C., and *M. Turner-Samuels* for the third and fourth defendants.

STABLE, J. : The defendants to this action are Charles Hunt, the insured, John Hunt, his son, a young man of about 17 or 18 years of age, who happened to be driving the car at the time when the material accident took place, and Percy Thorne and his wife Matilda, who are the persons who were injured in the accident, and who are in the course of

taking proceedings against the Hunts claiming damages against them for the negligent driving of the car.

- Under the Road Traffic Act, 1930, a system of compulsory insurance, designed to protect third parties from the consequences of the innumerable accidents which were taking place on the highways of this country, first came into force. Instead of enacting that every motor vehicle being driven on the highways of this country must at all times carry with it a policy of insurance which would ensure that any person who was injured as a result of the negligent driving of that vehicle, in the event of the responsible person being unable to meet the heavy liability which such accidents constantly involved, should have a solvent insurance company to which he might ultimately look for redress, the legislature adopted a halfway-house attitude, with the result that the comprehensive protection of third parties which the legislature presumably intended to provide was found to contain a number of gaps. With the object of stopping up some at least of those gaps, important amendments were introduced into the law under the Road Traffic Act, 1934. By sect. 10 (1) of that Act, it was provided in substance that, where an accident took place and the person responsible for that accident was insured under a policy which covered the risk, then, notwithstanding that the insurer might be entitled to avoid or cancel the policy, he should remain liable, subject to the provisions of the section, to pay the injured third parties the amount recovered against the wrongdoer, and any costs incurred in obtaining the judgment. Then subsect. (2) contains certain provisions protecting insurance companies, and subsect. (3), which is the material subsection which I have to consider, to some extent deprives the third parties of the advantages previously conferred on them by subsect. (1). So far as material, subsect. (3) provides as follows :

- No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within 3 months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provision contained in it.

- Sect. 12 of the same Act contains further provisions which are designed to protect third parties by enlarging the scope of the compulsory insurance by providing that certain terms in a policy which purport to restrict the risk in certain respects shall be of no effect as against third parties. The rights which subsect. (3) confers on the insurance company are rights which, in the first place, must exist, or which do exist, apart from any provision contained in the policy. That is to say, they must be rights which the insurance company has independently of any contractual stipulation, either under the common law or under those equitable principles which, since the Judicature Acts, have to some extent superseded the common law rules previously applicable in such

matters. The right which insurance companies have is the right to avoid the policy on the ground that :

. . . it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular . . .

It is clear that, to satisfy the provisions of the section, the fact which was not disclosed, or the representation which was false, must be material. A

Under subsect. (5), the expression " material " is defined as being :

. . . of such a nature as to influence the judgment of a prudent insurer in determining whether he will take the risk, and, if so, at what premium and on what conditions.

Further, the insurance company must show, not only that the non-disclosure or the misrepresentation was material, but also that the policy was obtained by reason of the non-disclosure where non-disclosure is complained of, or by reason of the misrepresentation where misrepresentation is complained of. B

To dispose of a preliminary point at an early stage, it was argued by counsel for the third and fourth defendants, the Thornes, that, inasmuch as the plaintiffs relied for proof of certain facts, which it was essential should be proved in order to entitle them to relief under the section, solely on admissions by one or other or both of the Hunts, his clients were entitled to be dismissed from the action, the adverse result having been achieved by evidence inadmissible against his clients, leaving it open to him to contend in some future litigation that any declaration which I might make in the present action was a declaration by which his clients were not bound. In my opinion, there is no substance in that contention. This is not an ordinary class of litigation. The essential parties to the litigation are the contracting parties—that is to say, the insurance company, on the one hand, and Charles Hunt, who was the other, and the only other, contracting party, on the other hand—but, under the provisions of the proviso to subsect. (3), the third persons, who may ultimately have their judgment met out of the funds of the insurance company, are entitled on notice to be made parties to the proceedings. That course was adopted in this case. The appropriate notices having been given, the Thornes were made parties to the proceedings. However, if the plaintiffs, by evidence which is admissible as between them and the other contracting party, satisfy me that they are entitled to the declaration which they are seeking, it is wholly immaterial, in my judgment, to consider whether that result has been arrived at by means of evidence which, if the proceedings had been proceedings simply against the Thornes, or proceedings which concerned only rights vested directly in the Thornes, might not have been admissible against them. In my judgment, once the declaration is made on evidence which is admissible against Charles Hunt, the other contracting party, then that declaration is a binding declaration, unless it is successfully appealed against, as regards all parties to this action. C D E F G H

In the case presented by the plaintiffs, exception was taken to answers

contained in the proposal form, dated Sept. 1, 1938, signed by Charles Hunt. Charles Hunt has not given evidence, and all I know about the circumstances which led up to the filling in of this proposal form and the ultimate issue of the policy is largely, if not wholly, derived from admissions which have been proved in evidence before me. It appears
A that Charles Hunt, who was a motorist of many years' experience, was insuring this particular car with this particular company for the first time. Question 7 (d) is :

Have you or any person who to your knowledge will drive the car ever been convicted of an offence in connection with a motor vehicle or motor cycle, or is
B any prosecution pending ?

The answer to that question was : "No." Of course, if Charles Hunt had known, in answering that question, that his son, who to his knowledge was likely to drive the car during the currency of the policy, had been convicted, as the fact was, of 3 motoring offences, that answer
C would be manifestly false. That Charles Hunt knew of these convictions at some subsequent date when he was interviewed on behalf of the insurance company appears from the evidence, but there is no evidence that Charles Hunt had any knowledge of the fact that his son had been convicted at the date when the proposal form was signed. Thus, the
D question which I have to consider is what that answer means. As to himself, of course, Charles Hunt is asserting "I have never been convicted of a motoring offence," and it was not suggested that the answer "No" was not a perfectly accurate and complete answer to that question. As
E regards the conviction of any person who to his knowledge will drive the car, the question I have to answer is : Does the answer mean "No, to the best of my information and belief," or does it mean : "I have the requisite knowledge to enable me to answer the question and the answer is 'No' " ? I have been referred to a Scottish case in the Court of Session, *Zurich General Insurance Co. v. Livingstone* (1). The question
F in the proposal form there was :

Have you or has any other person who to your knowledge will drive been convicted of any offence in connection with any motor vehicle ; if so state nature of the offence, date and amount of the fine, and if licence was indorsed or suspended ?

The answer to the question was : "No." It was held in that case that
G that answer was a double statement of fact :

Firstly, I know the answer to the question and, secondly, the answer to the question is "No."

I must confess that I have hesitated some time as to whether or not,
H taking the commonsense view of the matter, what the answer really means is not : "No, to the best of my knowledge and belief." In the ordinary affairs of life, we are constantly asserting something of which we are not certain. People frequently say "Yes" or "No," meaning, and being understood to mean, "Yes" or "No" to the best of their existing information and belief. A man asks another, "Is your wife well ?" and the other replies : "Yes." It may well be that he has

not heard from her for 24 hours, and he cannot possibly know, at the moment when he is giving the answer, that his wife is well, and the questioner cannot suppose that he does. That answer means, and is understood to mean, that his wife is well to the best of his present information and belief. However, having given the matter careful consideration, I think that, in the result, my judgment coincides on A that point with the view, which was expressed in the Scottish court, that, if a proposer for an insurance gives an unqualified negative to a question, that answer is an assertion, first of all, that he has the knowledge which he purports to impart, and, secondly, that that knowledge is what he is imparting. I have no doubt that the answer to that B question was a material matter within the meaning of the section of the Road Traffic Act, 1934.

That brings me to Question 8 (a): "Will the car be driven by any person under 21?" The answer to that question was: "No." I am quite satisfied by the admission which Charles Hunt made to one of the C witnesses, as well as by the admission contained in a statement on the claims form written out and signed by John Hunt and countersigned as accurate by Charles Hunt, that that answer was untrue. There is no suggestion of fraud in this case. Although I do not know that the D fact has been strictly proved, it appears that Mrs. Hunt actually filled in the answers, acting as scribe, and that then Charles Hunt signed it, and I have no doubt that it was by inadvertence that Charles Hunt put his signature to that statement which was untrue. It was within his knowledge at the time when the proposal was filled in that, subject E to the ordinary chances of life, the car would be driven quite frequently by John Hunt, his son, who at that time had quite recently qualified himself under his father's tuition for a licence to drive a motor car. I am satisfied by the evidence that the question of age is a material matter, and I am satisfied that this policy was obtained on the strength F of the answers to Questions 7 (d) and 8 (a). Of course, I do not suppose for a moment that those were the only factors which the underwriters took into consideration. Nobody comes to a conclusion on one or two isolated factors. To paraphrase what one of the witnesses said: "You G look at the whole picture before reaching a decision." However, looking at the whole picture involves looking at the several parts of the picture. I think that material parts of the picture are the answers to Questions 7 (d) and 8 (a), and I hold that, as a result of those answers, both on material matters, this policy was obtained. I am further satisfied that, although the misrepresentation in each case was innocent, the information conveyed was in fact false. H

If the matter rested there, the plaintiff company would be entitled to succeed in this action. However, counsel for the Thornes took one final point, and on that point, in my judgment, he is entitled to succeed. I have come to that conclusion with a hesitation not altogether unmixed with satisfaction, because, if it has the result of compelling insurance

companies, in a matter of everyday concern, which affects every person who desires to drive a motor car, to reduce their contracts and proposals which lead up to their contracts to a form which clearly expresses the terms of the bargain which is being made, this action will not have been fought in vain. The policy contains these words :

A Whereas the person or persons named in the schedule hereto (hereinafter called the "insured") by a proposal and declaration which shall be the basis of this contract and is deemed to be incorporated herein has applied to the [company] for the insurance hereinafter contained . . . [provided] (a) That the truth of the statements and answers in the said proposal shall be conditions precedent to any liability of the company to make any payment under this policy . . .

B With that particular proviso I am not concerned, because it is common ground that to succeed the plaintiff company must rely on grounds wholly independent of anything contained in the policy. Then it continues as follows :

C That nothing in this policy or in any indorsement thereon shall affect the right of any person indemnified by this policy or of any other person to recover an amount under or by virtue of the provisions of . . . the Road Traffic Act, 1934, ss. 10, 12, but the insured shall repay to the company all sums paid by the company which the company would not have been liable to pay but for the said provisions of the above-mentioned Acts.

D I may say at once that, if I were sitting under a palm tree unfettered by any rules, I should not suppose that this insurance company, by putting that clause into its policy, intended to deprive itself of the measure of protection which it obtains under the Road Traffic Act, 1934, s. 10 (3). Indeed, the fact that it has brought this action is a clear indication to the contrary. However, it is not for me to speculate on what the insurance company meant, or what it intended. It is for E me to read and to construe what it has written. I asked counsel for the insurance company the meaning of the words :

...nothing in this policy or in any indorsement thereon shall affect the right of any person indemnified by this policy or of any other person to recover an amount under or by virtue of the provisions of...the Road Traffic Act, 1934, s. 10...

F If it means that the insurance company is conferring on the insured or any other persons the rights which an Act of Parliament has given them, and which nothing short of an Act of Parliament can take away, rights which are wholly independent of contract, and of which the contract cannot deprive them, the words are, to say the most complimentary G thing about them, pure surplusage. Nothing in this policy could affect those statutory rights. The Act of Parliament expressly provides for that. Therefore, if that is all it means, it means nothing. Assuming that the words have some meaning, what is it ? I think that I am entitled—indeed, bound—to read and to construe the words strictly, and, if H there is any doubt on the matter, against the insurance company, whose choice of language it is. It is not an entirely fantastic conclusion that an insurance company, anxious to attract custom, might hold out as an inducement a policy which expressly agreed that the rights conferred on the insurance company by sect. 10 should be abandoned or restricted. It might be a very substantial inducement to a member of the public

to place his insurance with the company, and thus obtain that facility, as opposed to a company which did not do that, and so be protected against the possibility of having to defend what might be a long and expensive lawsuit launched under the Road Traffic Act, 1934, s. 10 (3). The question is whether or not this company has done that. What does it say? "Nothing in this policy." What is the policy? The policy A is the proposal, and the answers and the declarations which are deemed to be incorporated in it. It says:

... nothing in this policy or in any indorsement thereon shall affect the right of any person indemnified by this policy or of any other person to recover an amount under or by virtue of the provisions of [this particular section]. . .

Reading the latter words in the light of the particular matters which I have to consider, and reducing the general words which are used to the particular, substituting for "Nothing in this policy" the words "Nothing in the answers [in the proposal]," the effect of the clause is: "Nothing in the answers shall affect the right of any person indemnified by this policy or of any other person to recover an amount under or by virtue of the provisions of" sect. 10. Sect. 10 (1) expressly confers certain rights to recover notwithstanding that the policy might be avoided, but this right in turn is restricted by the right conferred or restored by subsect. (3), which enables the insurance company to avoid the policy by reason of matters contained in the answers to the questions in the proposal form, and so to affect the rights of persons to whom indemnity was given. I find that, upon the proper construction of this clause of the policy, the insurance company has expressly contracted itself out of the right to a declaration in the terms asked for, and this action fails.

Judgment for the defendants with costs.

Solicitors: *L. Bingham & Co.* (for the plaintiffs); *R. I. Lewis & Co.* (for the first and second defendants); *Silverman & Livermore* (for the third and fourth defendants).

[Reported by D. K. BELCHER, Barrister-at-Law.]

HINCKLEY AND SOUTH LEICESTERSHIRE PERMANENT BENEFIT BUILDING SOCIETY *v.* FREEMAN.

[CHANCERY DIVISION (Farwell, J.), **October 10, 1940.**]

Practice—Adjournment of proceedings—Inherent power of court to adjourn proceedings for stated time—Direction under R.S.C., Ord. 55, r. 5A.

On an application to the master by the mortgagees for possession, the mortgage money being overdue, the application was adjourned by the master for 3 months. The mortgagees adjourned the matter into court on the grounds that the master had no power to make such an order, and that the only order which the master, or even the court, had power to make was an order for possession. It was further contended that the direction given under R.S.C., Ord. 55, r. 5A, was *ultra vires*:—

HELD: the order for adjournment was one which the master had power to make, and the directions given under R.S.C., Ord. 55, r. 5A, permitting

the master to make such an order were not *ultra vires*. There is an inherent jurisdiction in the court to adjourn matters for such periods as the court thinks fit. With regard to this summons, the 3 months being now past, the summons was adjourned back to chambers.

[EDITORIAL NOTE.] Under the common law a mortgagee was placed in a very favourable position in the matter of enforcing his security. Through a long course of years the mortgagor has received increasing protection by the exercise of the equitable jurisdiction of the court. In 1936, matters of this kind were assigned to the Chancery Division, and, since then, the mortgagee has had upon every application to make out a case for the exercise of the remedy he is seeking to enforce. In 1937, the judges gave a number of directions to be observed upon such applications. It is here sought to show that one of these directions was *ultra vires*, but it is held that the court has an inherent power to adjourn any proceeding for a stated time. Any such order is subject to appeal, and that is sufficient protection to the litigant against its improper use.

AS TO ADJOURNMENT OF PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 26, p. 93, para. 176; and FOR CASES, see DIGEST, Practice, Nos. 2156-2171. See also YEARLY PRACTICE OF THE SUPREME COURT, 1940, pp. 1149-1158.]

ADJOURNED SUMMONS by the Hinckley and South Leicestershire Permanent Benefit Building Society for the possession of land comprised in a mortgage, dated Oct. 28, 1937, and being the property of Margaret Elizabeth Freeman. The facts are fully set out in the judgment.

G. Crosse (for *E. Milner Holland* on war service) for the plaintiffs.

The defendant did not appear and was not represented.

The Attorney-General (*Sir Donald Somervell, K.C.*) and *A. Andrewes Uthwatt* for the Crown.

FARWELL, J. : This is a summons which is taken out by the Hinckley and South Leicestershire Permanent Building Society against Margaret Elizabeth Freeman, the wife of James Freeman, and by it the plaintiffs asks for an order that the defendant should give possession of the land comprised in the mortgage and further or other relief. The summons was issued on Feb. 13, 1940, at which time there was due under the mortgage a sum of over £50. The matter came before the master on Apr. 2, 1940, and thereupon the master adjourned the matter for 3 months, but gave the plaintiffs liberty to apply before that date in the event of the current instalments payable under the mortgage not being paid. The plaintiffs did not adjourn the matter into court for the purpose of getting any alteration in that order which the master had made, but brought the matter into court claiming that such an order—namely, any order for the adjournment of the hearing of the summons—was an order which the master—and I think they say this court—has no jurisdiction to make, and that there is no course open to this court other than to make the order for possession which the plaintiffs seek.

Although on the face of it the matter appears to be a simple one, dealing only with the particular facts of the particular case, it has been argued on much wider grounds, and counsel for the plaintiffs has argued

that this court is bound, in a case of this sort, to make an order for possession there and then when the matter comes before the court, and that any adjournment which the court may otherwise think fit to order is not a course which is open to the court at all. The way in which he puts his case is this. He says, and quite properly says, that, before the passing of the Judicature Act, 1875, a mortgagee had a remedy at common law whereby he could obtain possession of the mortgaged property in certain events. The mortgagee also had a remedy in equity by taking foreclosure proceedings, but, as far as the equitable relief was concerned, equity required that the accounts should be taken and the matter investigated before it gave the mortgagee the absolute ownership of the property, whereas at common law an order for possession could be obtained and actively enforced by an order for ejectment or in some other way. Counsel for the plaintiffs says, and quite truly says, that the court of equity in those days would not, and never did, interfere by way of injunction to restrain the mortgagee from taking such remedy as he had at common law for enforcing his security, although the result to the mortgagee might be unfortunate if ultimately an account came to be taken, because the account might be taken against the mortgagee strictly, and in a way which might not be beneficial for him, but, as far as any interference by injunction against the step at common law which the mortgagee was entitled to take, the court of equity would not interfere.

As a result of the Judicature Act, 1875, the difference between a court of law and the court of equity was very largely discontinued, and the two were to a very large extent fused into one, with the result that it was open to the mortgagee to take any remedy which was open to him either in the court of equity or in the courts of law, except that the matters of foreclosure and injunction were specially assigned to the Chancery Division, and, therefore, were matters which had to be dealt with in that division. However, the mortgagee still had his right in a proper case to obtain an order for possession in the King's Bench Division and sign a judgment for possession and proceed to get possession and enforce the order in any way he thought right.

In very recent times—namely, in 1936—the rules have been altered, so that a mortgagee is no longer in a position to sign final judgment for possession in the King's Bench Division. As a result of the alteration in the rules, all matters :

... in which there is a claim for payment of principal money or interest secured by any mortgage or charge upon real or leasehold property or a claim for possession of any such property forming a security for payment to the plaintiff of any principal money or interest shall be assigned to the Chancery Division.

That was by R.S.C., Ord 5, r. 5A, and there was also an alteration in R.S.C., Ord. 55, r. 5A, which provides as follows :

Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may

take out as of course an originating summons, returnable in the chambers of a judge of the Chancery Division, for such relief of the nature or kind following as may by the summons be specified. . .

The nature of the relief is as follows :

Payment of moneys secured by the mortgage or charge, sale, foreclosure, delivery of possession by the mortgagor, whether before or after foreclosure, redemption, reconveyance, delivery of possession by the mortgagee.

- A Thus, under the rules as they stand, a mortgagee can, by an originating summons in the Chancery Division, seek an order for possession, for instance, but he cannot get that by simply signing judgment. The matter has to go in the first instance before the master in Chancery,
- B and either he will see to it that the defendant appears, or he goes into the matter to see that the plaintiff is entitled to his order. However, if the plaintiff proves that he is in fact in the position of a mortgagee who is entitled to possession and is entitled to his order, of course he will get possession, and there is nothing in the rules, I think, which can
- C alter the right of the mortgagee, which he had before the passing of the Judicature Act, 1875, which he had after the passing of that Act, and which, in my judgment, he still has, to possession in proper circumstances. The matter has been carried a little further, because in certain directions which were given by the judges of the Chancery Division to
- D the master there is a direction as follows :

When possession is sought and the defendant is in arrear with any instalments due under the mortgage or charge and the master is of opinion that the defendant ought to be given an opportunity to pay off the arrears, the master may adjourn the summons on such terms as he thinks fit, and if the defendant is in default of appearance direct the plaintiff's solicitor to communicate such terms to the defendant by letter.

- E Thus, when the matter comes before the master in the way I have mentioned, if the defendant does not appear, the master can take steps to insure that the defendant has an opportunity of being heard before any order for possession is made. In the present case, the defendant
- F did enter an appearance, and was represented before the master, I am told, by her husband. No objection was taken to his stating what the position was from his wife's point of view, and, in the result, the master made an order, or he directed, that the summons should stand over for 3 months. He also gave the plaintiff liberty to restore at any time
- G before that date if the mortgagor did not pay the current amounts due under the mortgage. The plaintiff says in this case that the master had no power to give any such direction as that, and I think that he goes as far as to say that the general direction contained in the passage I have just read from THE ANNUAL PRACTICE, saying that in a proper
- H case the master may adjourn the summons if he thinks fit, is a direction which the judges had no power to give to the masters at all, and that the plaintiff was entitled to his order for possession and, I take it his argument goes, was entitled to say : " Give me my order here and now to-day, and, if you do not, you are going beyond the powers of the court and refusing a plaintiff the justice to which he is entitled."

The proposition that this court has not power to adjourn any matter on any proper ground is new to me. No doubt the court cannot postpone the hearing of a matter indefinitely, because, if a court did so, it might thereby lead to defeating justice altogether, and a mere arbitrary refusal to hear a particular case is not a matter which, when dealing with litigation, would ever become a recognised thing. I cannot conceive any judge taking a course of that sort. However, to say that the court has not always an inherent power to direct that any matter which comes before it should stand over for a period if the court thinks that that is the proper way to deal with the matter is a proposition entirely new to me. As I pointed out in argument, supposing the court said, "I am not going to hear this matter for 3 months," what power is there which can compel the court to sit and adjudicate upon the matter until the expiration of that period? No doubt the person aggrieved has a remedy, because he can go to the Court of Appeal—and, if the Court of Appeal does not help him, he may, with leave, go to the House of Lords—and the Court of Appeal may say that the matter ought to be dealt with at once and send it back to the judge who has adjourned it, or to some other judge, to deal with the matter as they may direct. Apart from that, however, I know of no method beyond taking steps, which are possible, to have such a judge removed from his office on the ground of his misconduct, by which the court can be compelled to hear the matter there and then, on the ground that it has no jurisdiction to say: "I shall adjourn this, for reasons which appear to me to be sufficient, for a definite period."

In my judgment, there is nothing whatever which is in any way *ultra vires* or improper in the direction which the master has given in this case, nor do I think that there is anything improper in the general direction which is to be found in THE ANNUAL PRACTICE. It is to be noted that the direction in THE ANNUAL PRACTICE does not direct a master in every case of this sort peremptorily to adjourn the matter for 3 months. It is a direction that the master may adjourn it for 3 months if, in all the circumstances, he thinks that that is the proper way of doing justice between the parties. If the master is wrong in a particular case in thinking that that is the way to proceed, the litigant has his remedy in taking the matter to the judge, and, if the judge takes the view which the master took and the litigant is still dissatisfied, he can go higher and obtain, if he can, a reversal of the judge's direction. To my mind, however, it is quite beyond anything which I have ever heard suggested in court to say that the court has not jurisdiction under its own procedure in a proper case to direct that a matter should stand over for such period as the court, in all the circumstances, thinks justice requires.

In my judgment, the master had the jurisdiction, which was a proper jurisdiction, to make the order which he has made, and, as far as this summons seeks to get the master's direction reversed on the ground that

he had no jurisdiction to make it, in my judgment, it fails, and should be dismissed. I think that it would be better if I sent this matter back again into chambers with a direction that, if the master is satisfied that none of the payments has been made during the last 3 months, he is to make an order for possession. That will, of course, be subject to the defendant's right to get relief under the Courts (Emergency Powers), Act.

Summons dismissed. No order as to costs.

Solicitors: *Corbin, Greener & Cook*, agents for *Oakey & Son*, Hinckley (for the plaintiffs); *The Treasury Solicitor* (for the Crown).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

NESTA, LTD. v. WYATT AND ANOTHER.

[KING'S BENCH DIVISION (Macnaghten, J.), **October 2, 3, 7, 1940.**]

C Income Tax—Deduction of tax—Royalties—Deduction not made out of profits or gains brought into charge—Provisional Collection of Taxes Act, 1913 (c. 3)—Income Tax Act, 1918 (c. 40), s. 211 (2)—All Schedules Rules, r. 21.

The plaintiff company covenanted to pay E. E. J. certain royalties in respect of a patent mortgaged to him. By Mar., 1921, arrears of royalties amounted to £1,819 7s. 1d., and it was then agreed by way of compromise that the debts due to him from the plaintiff company should be discharged upon the following conditions being fulfilled: (i) that a salary of £500 per annum be voted to E. E. J., (ii) that the above loan be incorporated in another existing loan at the same rate of interest, (iii) that the accrued royalties be paid by a sum of not less than £200 per annum in equal half-yearly payments. On July 21, 1921, the company paid E. E. J. a sum of £100. This sum was not paid out of profits or gains brought into charge, as the company in fact made no profit in that year. In accordance with All Schedules Rules, r. 21, tax had to be deducted from this payment, which was therefore treated as a payment of £142 17s. 2d. and the amount of royalties thereby reduced to £1,676 9s. 11d. No further payment was made till May 24, 1937, when the company paid this amount of £1,676 9s. 11d. in full. They omitted, however, to deduct tax, and this action was brought under the Income Tax Act, 1918, s. 211 (2), to recover the tax on so much of the royalties as was not paid out of profits or gains brought into charge. The Finance Act, 1937, did not receive the Royal Assent until July 29, 1937, although the budget proposals relating to income tax were introduced on Apr. 20, 1937:—

G HELD: (i) the transaction of Mar., 1921, was not a transaction of loan of the amount due for arrears of royalties, and the payment of the sum of £1,676 9s. 11d. on May 24, 1937, was, therefore, a payment of royalties.

(ii) the Income Tax Act, 1918, s. 211 (2) applies to a case of deduction of tax on royalties not paid out of profits or gains brought into charge.

H (iii) although the company might have deducted the tax under the provisions of the Provisional Collection of Taxes Act, 1913, the omission to do so did not disentitle them to the relief afforded by the Income Tax Act, 1918, s. 211 (2).

[EDITORIAL NOTE.] The Income Tax Act, 1918, s. 211 (2) provides that if, prior to the passing of the Finance Act of any year, a person liable to make any annual payment has not deducted the tax from such payment, he may make the deduction from the next payment, or, if there is no future payment, then he may

recover the tax by action as a debt due to him. The main point in this case is one of construction of the subsection. There is a dictum of SCRUTTON, L.J., in *Hill v. Kirshenstein* (1) to the effect that the subsection applies only where the tax is not to be accounted for to the Crown, which was not the case here, since, the royalties not having been paid out of profits and gains brought into charge, the payer was accountable to the Crown for the tax, and, in accordance with this dictum, could not, therefore, rely upon the subsection. It would seem, however, either that SCRUTTON, L.J., was misreported in this respect, or that, dealing with a point not essential to the decision of the appeal, he was speaking without the advantage of a full argument upon the point. It is here held that there is no reason for any such limitation as the dictum suggests, and that the plaintiff company has a cause of action within the subsection. A

AS TO DEDUCTION OF TAX, see HALSBURY, Hailsham Edn., Vol. 17, pp. 60, 61, para. 117; and FOR CASES, see DIGEST, Vol. 31, pp. 290-294, Nos. 4357-4395.] B
Case referred to :

(1) *Hill v. Kirshenstein*, [1920] 3 K.B. 556; 31 Digest 291, 4369; 89 L.J.K.B. 1128; 123 L.T. 766.

ACTION to recover the sum of £392 13s. 10d. as a debt due to the plaintiffs from the defendants under the provisions of the Income Tax Act, 1918, s. 211 (2). The facts are fully set out in the judgment. C

F. Grant for the plaintiffs.

J. S. Scrimgeour for the defendants.

MACNAGHTEN, J. : In this action, the plaintiffs, Nesta, Ltd., seek to recover from the defendants, who are the executors of Eric Eldridge Johnson, deceased, the sum of £392 13s. 10d. as a debt due from the defendants to them under the provisions of the Income Tax Act, 1918, s. 211 (2). That subsection was a re-enactment of the Revenue Act, 1911, s. 14 (2), which was passed for the purpose of obviating a difficulty which arose in the case where a person was authorised or required to deduct income tax from rent, interest or any other annual payment made by such person before the annual Finance Act imposing the income tax had come into force. The subsection authorises the person making such payment before the Finance Act is passed to deduct tax from the next payment, and, in a case where no future payment is made by him, the subsection enables him to recover the sum which might have been deducted as if it were a debt due from the person against whom the deduction could legitimately have been made if the Act imposing the tax for that year had then been in force. The question at issue between the parties is as to the meaning and effect of the subsection. D E F G

As to the facts of the case, there is little or no dispute between the parties. Nesta, Ltd., was incorporated in 1914 for the purpose of acquiring the upholstering business previously carried on by one Jessup at Old Street, in London. The agreement between Jessup and Nesta, Ltd., for the sale and purchase of the business is dated Oct. 15, 1914, and one of the assets included in the sale was a British patent No. 27,457, dated Dec. 17, 1908, for an invention relating to improvements in mattresses, cushions, seats and other upholstered surfaces. One E. E. H

Johnson, who was the principal shareholder in Nesta, Ltd., and who had also advanced money to the company for the purpose of its business, held a mortgage on this patent to secure repayment of money advanced by him, and, by agreement with the plaintiff company, he was entitled to payment of a royalty in respect of all articles manufactured by the company in accordance with the patent. During the first years of its existence, Nesta, Ltd., was unable to pay Johnson all the royalties which were due to him under that agreement, and, by Mar., 1921, the royalties which had accrued due and were unpaid amounted to £1,819 7s. 1d.

On Mar. 2, 1921, Johnson addressed the following letter to the secretary of the company :

With reference to the agreement that has existed between your company and myself since 1914, whereby, in consideration of a loan of £1,065 2s., I receive a royalty of 1d. per square foot on all Nesta spring fillings manufactured. I am prepared to relinquish my rights under this agreement, as from Sept. 30 last, provided your directors agree the following conditions : (1) A salary at the rate of £500 per annum be voted to me ; (2) the above-mentioned loan of £1,065 2s. be incorporated in my existing No. 2 loan at the same rate of interest, viz. 8 per cent. ; (3) that the accrued royalties amounting to £1,819 7s. 1d. be repaid by a sum not less than £200 per annum in equal half-yearly payments. I should be obliged if you would take an early opportunity of placing this proposition before your directors.

At a meeting held on Mar. 14, 1921, the directors of the company decided to accept Johnson's proposal. Their decision was subsequently confirmed at the next annual general meeting of the company. Pursuant to this agreement, on July 21, 1921, Nesta, Ltd., paid to Johnson the sum of £100.

By the Income Tax Act, 1918, All Schedules Rules, r. 21, it is provided that, upon the payment of any royalty :

... not payable or not wholly payable out of profits or gains brought into charge, the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate of tax in force at the time of the payment.

The £100 so paid by the company to Johnson on July 21, 1921, was not paid out of profits or gains brought into charge, because in fact the company made no profits that year. It was, therefore, the duty of the company to deduct tax from any payment made to Johnson on account of royalties due to him. The sum of £142 17s. 2d., after deduction therefrom at the standard rate for 1921, amounted to £100, the sum actually paid to Johnson. Accordingly, the payment of £100 was treated as between the company and Johnson as a payment of £142 17s. 2d., and the unpaid royalties were accordingly reduced by that sum from £1,819 7s. 1d. to £1,676 9s. 11d. The audited accounts of the company for 1921, which were duly approved by the company in general meeting, showed the sum of £1,676 9s. 11d. as due from Johnson on royalty account at the end of the company's financial year.

Johnson died in Mar., 1937, but no further payment had been made to him on account of the royalties after July 21, 1921, and the sum of £1,676 9s. 11d. was, therefore, due to the defendants as his executors.

On May 24, 1937, Nesta, Ltd., paid that sum to the defendants. By mistake, they omitted to deduct income tax from it, and they now bring this action to recover the tax on so much of the royalties as were not paid out of profits or gains brought into charge, for it so happened that, in the financial year beginning Apr. 6, 1937, the company made a small profit, and part of the royalties were paid out of profits or gains which had been brought into charge. The Income Tax Act, 1918, s. 211 (2), provides as follows :

Any person liable to pay any rent, interest or annuity, or to make any other annual payment, shall be authorised to make any deduction on account of tax for any year of assessment which he has failed to make previously to the passing of the Act imposing the tax for that year, or to make up any deficiency in any such deduction which has been so made, on the occasion of the next payment of the rent, interest or annuity, or making of the other annual payment after the passing of the Act so imposing the tax, in addition to any other deduction which he may be by law authorised to make, and shall also be entitled, if there is no future payment from which the deduction may be made, to recover the sum which might have been deducted as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing tax for the year had been in force.

As I have said, on May 24, 1937, payment was made, but the Finance Act, 1937, did not receive the Royal Assent until July 29, 1937. The whole amount of the royalties which had accrued due was paid on May 27, and, therefore, there was no future payment from which the plaintiff company could make any deduction. The plaintiffs, therefore, claim under the final provisions of the section to recover the sum which might have been deducted if the Act had been in force on May 27, as if it were a debt due from the defendants.

There are three answers put forward to this claim. In the first place, it is said that the payment of the £1,676 9s. 11d. on May 24, 1937, was not a payment of royalties at all, that the transaction which took place in Mar., 1921, was a transaction whereby Johnson lent the amount then due by the company, and that the company, out of the money so lent, in fact then paid all royalties, and that all that was left as between the parties was a simple contract debt arising from a transaction of loan. I do not think that there is any ground on which that contention can be based. It is plainly contrary to the terms of the letter of Mar. 2, 1921, which I have read, but what perhaps is even more significant is that it is entirely contrary to what actually happened when, in pursuance of that agreement, the plaintiff company paid £100 to Johnson on July 21, 1921. As I have pointed out, that payment was treated as a payment of £142 17s. 2d., and the difference between the £100 and the £142 17s. 2d., being the amount of the tax on that sum, was deducted, so that the actual payment to Johnson was the agreed half-yearly payment of £100. Throughout, in the books of the company and in the books of Johnson, the balance remaining after giving credit for £142 17s. 2d.—namely, £1,676 9s. 11d.—was treated as a payment due from the company to Johnson on account of the royalties which had accrued due to him before Sept. 13, 1920.

The second point which was raised was based on a statement contained in a judgment of SCRUTTON, L.J., in *Hill v. Kirshenstein* (1). That was a case in which a question arose as to the right of a tenant who pays a sum in respect of landlord's property tax and omits to deduct it from his next payment of rent nevertheless to make the deduction from a subsequent payment of rent. One of the arguments in the case was that, although the authorities prior to 1911 made it plain that no such deduction could be made, the Income Tax Act, 1918, s. 211 (2), had altered the law. In the course of his judgment, SCRUTTON, L.J., said, at pp. 565, 566 :

- B It was argued that this general enactment [that one must deduct from the next payment of rent, and, if one does not, one cannot deduct at all] has been altered by the special provision contained in sect. 211 of the Act of 1918, which reproduces the Revenue Act, 1911, s. 14. That section deals with two cases. Subsect. (1) applies where the tax is to be accounted for to the Crown; subsect. (2) applies where the tax is not to be accounted for to the Crown.
- C Admittedly, in this case, since the tax was not paid out of profits or gains brought into charge, it would have to be accounted for to the Crown, and, therefore, if the statement of SCRUTTON, L.J., is correct, the provisions under which the plaintiffs base their claim have no application at all, and the claim must fail. The statement made by
- D SCRUTTON, L.J., was not necessary for the decision at which the Court of Appeal, affirming the judgment of DARLING, J., arrived. It was an *obiter dictum*. Nevertheless, it is my duty, of course, to pay regard to it, unless I can see good reason to the contrary. I asked counsel whether they could furnish any reason for the limitation which SCRUTTON, L.J., placed upon subsect. (2), and neither of them, I think, was able to furnish any reason at all. There is nothing which I can see in sect. 211 which supports the statement made by SCRUTTON, L.J. There are two possibilities. There is high authority for saying that a Lord Chancellor may possibly make a mistake. Therefore, I think that I am at liberty to say
- F that even a Lord Justice may make a mistake. However, what seems to me perhaps a more probable explanation is that SCRUTTON, L.J., has been misreported. It is quite true that sect. 211 (1) expressly provides for the payer accounting to the Crown, whereas subsect. (2) does not do so. Subsect. (2) does not do so because the provisions requiring the person
- G making the deduction to account to the Crown are to be found in the All Schedules Rules, and it may be that SCRUTTON, L.J., was calling attention to that difference between the two subsections, and, by some misplacement of words, the statement appears in the authorised report in its present form and in a form which, so far as I can see, is not correct.
- H Therefore, I am unable to accept the argument that sect. 211 (2) does not apply where the deduction is not made out of profits or gains brought into charge. In my view, the subsection does apply to those cases.

Then there was a third point raised—namely, that, although the Finance Act, 1937, was not passed until July 29, 1937, a few months after the payment was made, the plaintiff company might have deducted

the tax under the provisions of the Provisional Collection of Taxes Act, 1913. That is the Act which was passed, in consequence of the litigation successfully brought against the Crown by one Gibson Bowles, for the purpose of giving temporary validity for a limited period to the budget resolutions which are passed on budget day.

In 1937, the budget provisions relating to income tax were passed A on Apr. 20, 1937, and, therefore, under the Provisional Collection of Taxes Act, 1913, all the provisions of the Income Tax Act were made applicable temporarily, and the deduction, it is admitted, might have been made by Nesta, Ltd., if they had been mindful to do so. It is said, therefore, that the very mischief which the Income Tax Act, B 1918, s. 211 (2), was intended to remedy did not exist, and that, in truth, when the Revenue Act, 1911, s. 14, was repealed by re-enactment in the Income Tax Act, 1918, the wording of the re-enactment ought to have been modified so as to accord with the provisions of the Provisional Collection of Taxes Act, 1913. The mischief under the Revenue Act, C 1911, s. 14, might still exist, because the financial year commences on Apr. 6 and budget day never can be before that date, because it cannot take place until after the close of the financial year and the mischief could only exist between Apr. 6 and budget day. However, when Parliament passed the Income Tax Act, 1918, it did not modify or alter D the provisions of the Revenue Act, 1911, s. 14. In that Act, the words are plain that, if the payment is made before the passing of the Act imposing income tax, the provision is to take effect, and, in such a case as the present, where there is no future payment—that is to say, no payment becoming due to be made after the passing of the Finance E Act—the person who has paid without making deduction can:

... recover the sum which might have been deducted as if it were a debt due from the person as against whom the deduction could originally have been made if the Act imposing tax for the year had been in force.

In my view, therefore, the plaintiffs' claim in this action is well- F founded, and judgment must be entered for them for £392 13s. 10d., the amount of tax at the standard rate of 5s. for 1937 on the sum of £1,570 15s. 7d., which is the amount of the royalties which were not paid out of profits or gains brought into charge for income tax.

Judgment for the plaintiffs for £392 13s. 10d. and costs.

Solicitors: *Baileys* (for the plaintiffs); *Waltons & Co.* (for the G defendants).

[Reported by D. K. BELCHER, Barrister-at-Law.]

O'HARA v. LIPMAN.

[CHANCERY DIVISION (Morton, J.), **September 25, October 1, 1940.**]

Emergency Legislation—Forfeiture of deposit Notice that deposit would be forfeited if balance not paid by stated time—Whether exercising remedy by way of forfeiture of deposit—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2).

The defendant agreed in writing to buy certain properties from the plaintiff and paid a deposit of £925. Owing to the defendant's subsequent failure to complete, the plaintiff's solicitors wrote to his solicitors on Oct. 21, 1939, extending the time for completion until Nov. 30, 1939, and stating that, if the contract was not then completed, she would claim the forfeiture of the deposit:—

HELD: in sending the letter of Oct. 21, 1939, the plaintiff was not proceeding to exercise a remedy within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1 (2), and was not, therefore, bound to obtain the leave of the court before sending the notice.

[EDITORIAL NOTE. The question here is at what stage in the forfeiture of a deposit, the vendor must apply for leave of the court to proceed. All that is decided here is that the giving of the usual notice naming a time for completion does not require the leave of the court.

AS TO COURTS (EMERGENCY POWERS) ACT, 1939, s. 1 (2), see BUTTERWORTHS' EMERGENCY LEGISLATION, Statutes Volume, p. 207.]

ACTION for forfeiture of deposit paid in respect of a contract for sale of land, permission to resell, and damages.

Elizabeth O'Hara agreed to sell to John Henry Lipman Nos. 7, 9, and 11, High Street, Rhyl. There were two contracts, one dated Aug. 25, 1939, and incorporating with certain variations the Law Society's General Conditions of Sale, 1925 (1928 Edn.), and one dated Aug. 26, 1939, and incorporating with certain variations the Law Society's General Conditions of Sale, 1934. The former was signed by the defendant, while the latter was signed by both parties. A deposit of £925 was paid by the defendant to the plaintiff's solicitors, and Sept. 30, 1939, was fixed for completion. Owing to the defendant's failure to complete, the plaintiff's solicitors wrote to the defendant's solicitors on Oct. 21, 1939, as follows:

... we cannot agree that your client's inability to perform his contract is due by reason of circumstances directly or indirectly attributable to the war. ... Our client is most anxious to give your client reasonable time to complete his contract, and she has instructed us to extend the time for completion until Nov. 30 next, but, if we do not receive the engrossment of the conveyance for execution by our client and the balance of the purchase money on or before that date, the vendor must exercise her remedies and claim the forfeiture of the deposit.

It was contended that in giving this notice the plaintiff was proceeding to exercise a remedy which was available to her by way of the forfeiture of the deposit within the meaning of the Courts (Emergency Powers) Act, 1939, s. 1 (2), and that the plaintiff was precluded from taking this step without the leave of the court.

H. B. Vaisey, K.C., and W. T. Elverston for the plaintiff.

E. M. Winterbotham for the defendant.

MORTON, J. : Counsel for the defendant contended that, in giving the notice of Oct. 21, the plaintiff was proceeding to exercise a remedy which was available to her within the Courts (Emergency Powers) Act, 1939, s. 1 (2), and that the plaintiff was precluded by the terms of that subsection from doing this without the leave of the court. I cannot accept this contention. When her solicitors wrote the letter of Oct. 21, A the plaintiff was not, in my view, exercising a remedy which was available to her by way of forfeiture of the deposit. She was giving a notice which might have one of two results. The defendant might have contrived to find the balance of the purchase money and to complete the purchase. If he failed to do so, as in fact he did, then, under the terms B of the contract, the contract would be void and the deposit would be forfeited. As the defendant did so fail, the forfeiture arose directly out of his failure, without any fresh intervening act on the part of the plaintiff. I cannot construe the Act as covering the sending of such a notice as this. I leave open for further argument the question whether C the plaintiff is now entitled to deal with the deposit as her own money without making any application to the court under the Act.

The plaintiff, on the same day on which she issued her writ, also issued a summons under the Courts (Emergency Powers) Act, 1939, for leave to forfeit the deposit. I express no view on that summons at the moment, D as I have given the defendant leave to file further evidence on it, if he so desires, and have adjourned the summons into chambers. I decide only that the plaintiff was not bound to obtain the leave of the court before sending to the defendant the notice of Oct. 21, 1939, and that that notice was such a notice as is described in the Law Society's General E Conditions of Sale, 1934, para. 32 (1). The defendant must pay the plaintiff's costs of the action.

Solicitors : *Soames, Edwards & Jones*, agents for *Joseph Lloyd & Co.*, Rhyl (for the plaintiff) ; *Page, Moore & Page*, agents for *Freeland & Passey*, Birmingham (for the defendant). F

[Reported by IRENE G. R. MOSES, *Barrister-at-Law.*]

Re OWERS, PUBLIC TRUSTEE v. DEATH.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **October 18, 21, 1940.**]

Estate and Other Death Duties—Incidence of duty—Legacy payable out of residue being the proceeds of conversion of realty and personality—Liability of legacy to bear proportion of estate duty attributable to real estate—Testamentary expenses to be paid out of residue—“Testamentary expenses”—Law of Property Act, 1925 (c. 20), s. 16 (1), (5)—Administration of Estates Act, 1925 (c. 23), ss. 2 (1), 53 (3).

The testator bequeathed £50,000 to the appellant. The will directed that legacy duty on all annuities and legacies should be paid out of the residuary estate. The estate consisted largely of realty. The will contained a direction to the trustees that they should “convert into money the same and . . . out of the moneys arising thereby or otherwise forming part of my estate pay my funeral and testamentary expenses and debts and the legacies. . .” The question arose as to whether or not, in so far as the legacy was payable out of the proceeds of a mixed fund of real and personal estate, it must bear its proportion of the estate duty attributable to real estate. It was contended that the legislation of 1925 had altered the meaning of the phrase “testamentary expenses” so that it now included estate duty on real estate:—

HELD: the property legislation of 1925 has not had the effect of changing the meaning of the words “testamentary expenses” to include estate duty on real estate. Therefore, the legacy, so far as it was payable out of a mixed fund, must bear its proportion of the estate duty attributable to the real estate.

Re Spencer Cooper, Poe v. Spencer Cooper (1) *approved.*

[EDITORIAL NOTE.] Two points are taken in this case. The first is that *Re Spencer Cooper, Poe v. Spencer Cooper* (1) was wrongly decided, but this found no sympathy with the court. The second is that the legislation of 1925 has had the effect of altering the meaning of the words “testamentary expenses.” Estate duty on real estate was not a testamentary expense before 1926, and it is now decided that, although the executor is now made accountable for that duty, as the ultimate incidence of the duty is not altered, the meaning of the phrase remains the same.

AS TO ESTATE DUTY AS A TESTAMENTARY EXPENSE, see HALSBURY, Hailsham Edn., Vol. 13, pp. 287-290, paras. 302, 303; and FOR CASES, see DIGEST, Vol. 21, pp. 6, 7, Nos. 11-20.]

Cases referred to:

(1) *Re Spencer Cooper, Poe v. Spencer Cooper*, [1908] 1 Ch. 130; 21 Digest 33, 204; 77 L.J.Ch. 64; 98 L.T. 344.

(2) *Re Palmer, Leventhorpe v. Palmer* (1912), 106 L.T. 319; 21 Digest 32, 195.

(3) *Re Morris, Skinner v. Sanders* (1927), 71 Sol. Jo. 472; Digest Supp.

APPEAL by the defendant from an order of MORTON, J., dated May 30, 1940. The defendant was appointed to represent the pecuniary legatees. He himself was a large pecuniary legatee, his legacy being £50,000. The value of the testator's personal estate was about £121,000, and the value of his real estate was about £270,000. The date of the will was Apr. 23, 1938.

H. B. Vaisey, K.C., and *John Pennycuick* (for *A. F. Maurice Berkeley* on war service) for the appellant.

H. Wynn Parry, K.C., and Russell Gilbert for the respondents Mount Vernon Hospital, Incorporated.

Wilfrid M. Hunt for the respondent trustees.

Vaisey, K.C.: The questions involved are whether the decision in *Re Spencer Cooper, Poe v. Spencer Cooper* (1) is still the law, and what meaning is to be attributed to the word "testamentary" in the present case. *Re Spencer Cooper, Poe v. Spencer Cooper* (1) ought not to be followed now. In *Re Palmer, Leventhorpe v. Palmer* (2), the court seemed to indicate that the decision in *Re Spencer Cooper, Poe v. Spencer Cooper* (1) was a matter of legitimate doubt. In the present case, there is a direction to pay the debts and funeral and testamentary expenses, and then to pay certain legacies. It is still possible to obtain probate without paying estate duty upon the real estate. The legislation of 1925 has made no difference in that respect. If the personal representative is accountable for the death duties and he pays them, it is reasonable to suppose that the testator assimilates the duty upon the real estate to that upon the personal estate. It is an anomalous direction that legacies should be paid out of a mixed fund, and yet, if the smallest fraction of the assets consists of real estate, a proportionate part must be charged upon it. In the present case, the legatee does not get the gift through the medium of a trust to pay. He is given a direct gift of £50,000. The Law of Property Act, 1925, s. 16 (1) alters the law by making the executors directly responsible for the duty on real estate. The Act has not altered the ultimate incidence of any duties. The testator himself has done so, because he has used the expression "testamentary expenses" in relation to the existing duties of an executor. By reason of the provisions of the Administration of Estates Act, 1925, s. 2, it may be said that the estate duty on realty is now a testamentary expense. [Counsel referred to *Re Morris, Skinner v. Sanders* (3).]

Counsel for the respondents were not called upon.

SIR WILFRID GREENE, M.R.: This appeal from the decision of MORTON, J., deals with a point concerning the incidence of estate duty which gives rise, has given rise, and no doubt will continue to give rise, to unintended results. The appellant is a legatee under the will of the late Ernest Owers, and his legacy is a very substantial one. It has been held by MORTON, J., that that legacy, in so far as it is payable out of the proceeds of a mixed fund of real and personal estate, must bear its proportion of the estate duty attributable to real estate. The estate is a large one, the rate of duty is high, and the result of the decision is that the appellant's legacy is very seriously cut down. By cl. 6 of his will, the testator gives this legacy to the appellant:

I bequeath to Charles Death of The Grove, Monken Hadley, Barnet, Herts, the sum of £50,000.

Then in cl. 8 he directs as follows:

... as regards all the annuities and legacies given by this my will or any codic

hereto the legacy duty payable in respect thereof shall be borne by my residuary estate.

Then in cl. 10 he directs as follows :

A I devise and bequeath all my real and personal estate not hereby otherwise disposed of (including all property whether real or personal over which I may have any general power of appointment or disposition by will) unto my trustees upon trust that my trustees shall sell call in and convert into money the same and shall out of the moneys arising thereby or otherwise forming part of my estate pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and make provision as aforesaid for the payment of any annuity so bequeathed and shall divide the residue of such moneys into twelve equal parts.

B Then he distributes those parts among a number of charities. In 1907, SWINFEN EADY, J., decided *Re Spencer Cooper, Poe v. Spencer Cooper* (1), the headnote of which is as follows :

C A general direction to pay legacies out of a mixed fund of residue charges them rateably on the portions attributable to realty and personalty . . . So far as the legacies are payable out of the portion attributable to realty they are real estate, and must bear their own estate duty, notwithstanding a direction to pay "testamentary expenses" out of the mixed fund.

D I cannot find, any more than MORTON, J., could find, any ground for distinguishing that case from the present one. I will refer in a moment to a particular argument which was presented by counsel for the appellant based upon the 1925 legislation, but, putting that point on one side for the moment, if *Re Spencer Cooper, Poe v. Spencer Cooper* (1) be well decided, it decides this case. Counsel for the appellant was unable to make any real criticism of the decision in *Re Spencer Cooper, Poe v. Spencer Cooper* (1). It is, no doubt, an unfortunate decision, in the sense that it discloses the existence of a trap into which I have no doubt many testators fall, and into which many testators will continue to fall. When a testator gives a legacy, and provides in the usual form that it shall be paid out of the proceeds of sale of his estate, one expects him not to intend that the legacy shall be cut down by being forced to contribute to the estate duty payable in respect of his real estate. Nevertheless, these matters are highly technical. Any provision which touches upon taxation is necessarily of a highly technical character, and, however much one may wish to smooth the path of testators by finding a way round this particular trap, it is not open to the court to do so. I have not been able to think, any more than counsel for the appellant has been able to think, of any effective criticism of *Re Spencer Cooper, Poe v. Spencer Cooper* (1). It has been referred to in one reported case in this court, but there, although it was attacked at the bar, this court did not find it necessary to express an opinion upon it. Of course, that does not mean, and must not be construed as meaning, that in any sense the court was dissatisfied with that decision. The case is *Re Palmer, Leventhorpe v. Palmer* (2). The decision in *Re Spencer Cooper, Poe v. Spencer Cooper* (1) has stood now ever since 1907, and, as far as I am aware, it has not been adversely criticised by any textbook writer. At

any rate, no such criticism was called to our attention, and, as I have already said, speaking for myself, I cannot find any flaw in the reasoning of SWINFEN EADY, J., if I may presume so far as to suggest that the reasoning of that judge could contain a flaw. In my opinion, *Re Spencer Cooper, Poe v. Spencer Cooper* (1) was correctly decided at the time.

That brings me to the only substantial argument put forward by A counsel for the appellant. He says that the legislation of 1925 has altered the position, not in the sense that it has directly provided for such a case, but in the sense that the phrase "testamentary expenses" must now be given a content different from that which it was held to have in *Re Spencer Cooper, Poe v. Spencer Cooper* (1). Counsel for the B appellant said that, having regard to that legislation, the phrase now includes the estate duty on real estate. If that argument were correct, the result would be that the executors would be bound to defray this estate duty on real estate out of the mixed fund, and would then pay the legacies out of the net fund remaining, and the appellant and the C other legatees would get their legacies without deduction for estate duty. Of course, the phrase "testamentary expenses" includes—and includes for a technical reason which is well-known but into which I need not go—the estate duty on personal estate.

The provisions of the legislation of 1925 to which reference must be D made in connection with this argument are the Administration of Estates Act, 1925, ss. 2 (1), 53 (3) (c), and the Law of Property Act, 1925, s. 16 (1), (5). I need not refer to all those sections at length. Suffice it to say that the Law of Property Act, 1925, s. 16 (1), provides as follows : E

A personal representative shall be accountable for all death duties which may become leviable or payable on the death of the deceased in respect of land (including settled land) which devolves upon him by virtue of any statute or otherwise.

Therefore, the result is that, where the testator's real estate devolves upon his personal representatives, they are accountable for the death F duties which are leviable in respect of that real estate. It is said that, in view of that provision, and in view also of the language (which I do not propose to read) of the Administration of Estates Act, 1925, s. 2 (1), when a testator uses the phrase "testamentary expenses," in the G light of the existing legislation and of the fact that the executor is under a statutory duty to pay his estate duty, he must be taken to be including in that phrase the liability so imposed upon the executor. If the matter had stood there, that argument would have been an attractive one. However, the matter does not stand there, because the legislation provides in the Administration of Estates Act, 1925, s. 53 (3), with reference H to the provision of that Act, that nothing in the Act shall alter the incidence of any death duties. The Law of Property Act, 1925, s. 16 (5), provides as follows :

Notwithstanding that any duties are by this section made payable by the personal representative or other person aforesaid, nothing in this part of this Act shall affect

the liability of the persons beneficially interested or their respective interests in respect of any duty and they shall accordingly account for or repay the same and any interest and costs attributable thereto to the said commissioners, or to the personal representative or other person accountable as aforesaid, as the case may require.

- The effect of the legislation, therefore, putting it quite shortly, is that, as between himself and the Revenue, a personal representative is accountable for estate duty on this class of real estate passing on the death, but the legislation very carefully preserves the incidence of that duty as regards the persons beneficially interested. In other words, the personal representative is to be the hand to make the payment in the first instance, but the ultimate burden of the duty is to fall where it ought to fall, and where it would have fallen but for this direction. It would be the duty of the personal representative, not merely to pay the duty to the Revenue but also, in dealing with the estate, to see that the burden falls where it ought to fall, and, accordingly, when I look at that part of the legislation as a whole, it seems clear to me that the one thing which the legislature was determined not to do was to allow this legislation to have any effect whatsoever on the position of beneficiaries and on the way in which the burden should be borne as between them. That being the character of the legislation, I have to put myself in the testator's place and see what meaning he was attaching to the phrase "testamentary expenses." The argument of counsel for the appellant would have us stop at that part of the legislation which directs the personal representative to pay the duty on real estate. It seems to me that the matter must be pressed a little further. It must be seen what the nature of that payment is under the statute. It is not an ultimate payment, which, when made, is the end of the matter. It is a payment carrying, according to the particular terms of the statute, the obligation on the beneficiary to accept his share of the burden. Therefore, when the testator used the phrase "testamentary expenses," he was using it in a state of the law in which a payment falling to be made in the first instance by the personal representative was to be recouped to him by the beneficiaries. That impresses upon that payment a character totally different from that of the payment made by the personal representative when he discharges the estate duty on personal estate. It is a temporary or provisional payment, which can be recouped from other persons. That being the nature of the payment under the statute, is it possible to say that the testator included that payment under the phrase "testamentary expenses"? In my opinion, it is not possible to construe those words so as to produce that effect, and the only remedy of testators wishing to free legacies from this portion of the estate duty is to frame the will in other language in the future. This case may have achieved one result, if no other, in that it has again brought out of its lurking place this unfortunate rule, which I have no doubt has defeated the real wishes of testators in the past, and, for all I know, may have done so in the present case.

In my opinion, therefore, that argument fails. Counsel for the appellant very properly called our attention to another matter on the language of this will, which is against him. He called attention to the fact that cl. 10 directs the legal personal representative to make provision for "all duties free from which any legacies or annuities may be bequeathed." The legacies here are bequeathed free of legacy duty. A They are not bequeathed free of any part of the estate duty, and, although we have not heard a full argument upon that particular phrase, it seems to me that that language would make it impossible to give the phrase "testamentary expenses" the wide meaning which counsel for the appellant would have us give to it, limiting, as it does, the duties B for payment of which express provision is made to those duties free from which the legacies were bequeathed, and that does not include estate duty.

In the result, therefore, the judgment of MORTON, J., was, in my opinion, perfectly right, and the appeal must be dismissed. C

CLAUSON, L.J.: I agree, and I have nothing to add.

GODDARD, L.J.: I agree.

Appeal dismissed.

Solicitors: *Merton Jones, Lewsey & Jefferies* (for the appellant and D for the respondent trustees); *Vandercom, Stanton & Co.* (for the respondent hospital).

[Reported by W. K. SCRIVENER, Esq., *Barrister-at-Law.*]

LONG OF WRAXALL (LORD) v. LONG OF WRAXALL (LADY).

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard L.J.J.)
October 22, 25, 1940.]

Dictum of SIR WILFRID GREENE, M.R., at p. 233, applied. CRABTREE v. CRABTREE. [1953] 2 All E.R. 56.

Divorce—Desertion—Deed of separation entered into subsequently—Deed reciting respondent's desertion but including an agreement to live separate and apart—Deed executed by petitioner under misapprehension—Deed bar to dissolution.

On May 25, 1936, the respondent wife deserted her husband without just cause. The parties did not live together after that date. On G July 1, 1937, the parties entered into a deed of separation which recited that the wife had deserted the husband without just cause and had refused to live with him, and that they had agreed to live separate and apart. The operative part of the deed included an agreement that the parties would live separate and that neither would take proceedings for restitution of conjugal rights. It then made provision for the maintenance of the respondent and the one child of the marriage. After H the deed was entered into, the husband tried to persuade the wife to return, but she refused. The deed had at all times been acted upon and treated by the parties as binding. The husband sought a decree of dissolution on the ground that his wife had deserted him without just cause for a period of 3 years immediately preceding the date of the petition, alleging that he executed the deed on the understanding that

it would not be a bar to a petition for dissolution of the marriage based on the respondent's desertion :—

HELD : the deed of July 1, 1937, by its terms prevented the desertion from continuing and was a bar to the granting of a decree for dissolution on the ground of desertion.

[EDITORIAL NOTE. Recent decisions on the question of desertion have stressed the importance of ascertaining the true state of mind of the parties as the real criterion of whether or not desertion in law is proved. In the present case it is held that full proof of the necessary state of mind cannot rebut an agreement under seal to live separate and apart, and then such a deed, acted upon, is effective to put an end to any desertion proved to exist immediately before the execution of the deed.

AS TO DESERTION, see HALSBURY, Hailsham Edn., Vol. 10, pp. 654-659, paras. 963-969; and FOR CASES, see DIGEST, Vol. 27, pp. 306-319, Nos. 2837-2977.]

Cases referred to :—

(1) *Pardy v. Pardy*, [1939] P. 288; [1939] 3 All E.R. 779; Digest Supp.; 161 L.T. 210.

(2) *Cohen v. Cohen*, [1940] A.C. 631; [1940] 2 All E.R. 331; Digest Supp.

APPEAL by the petitioner from an order of SIR BOYD MERRIMAN, P., dated June 18, 1940. The material facts are stated in the judgment.

Noel Middleton, K.C., and *Elliot M. Gorst* for the appellant.

A. Melford Stevenson for the respondent.

Middleton, K.C. : Although the deed of July 1, 1937, contained a covenant that the parties should live separate and apart, it was not intended by the husband to put an end to the cohabitation. The husband's frame of mind was quite different. The wife left the husband without cause, and the deed is a mere incident and it had nothing whatever to do with the separation. It was shown that the desertion was persisted in by the wife, irrespective of the deed. It is only if the deed estops me from saying that desertion continued that there is any difficulty. If the view taken is that the deed puts an end to the desertion, the requirements of the Matrimonial Causes Act, 1937, are not satisfied. If, however, the court can look behind the deed and ascertain the real facts, it will be seen that the facts are all in favour of the petitioner. *Cohen v. Cohen* (2) has some relevance to the present case. The court, however, has to look at all the facts, and not only at a fact which, at first sight, may seem to be of overwhelming importance. The court should see if the desertion is to be attributed to one only of the reasons, or if it is not to be attributed to them all. If the court can see its way to regard all the facts, it will be seen that, with one unfortunate exception, they are all in favour of the petitioner. The wife deserted the husband in May, 1936. She continued to desert him, and admitted that she had no just cause for doing so. The husband's signature to the deed was obtained after the wife had made that admission. After the deed was executed, the husband asked the wife to return. The wife refused to return. The wife has not filed an answer to the present petition, and she does not set up the deed as an answer

to the case. In *Pardy v. Pardy* (1), it was said that the deed in that case was a mere incident in the history of the matter after the *animus* of the wife had been shown. There is no event after July 1, 1937, which can affect the deed, except that the husband was anxious that the wife should return to him, and he was not relying upon the deed. The deed in the present case is a mere incident which has had no effect whatever upon the relations of the parties. A

Stevenson: The respondent would welcome relief from the tie of this marriage. The difficulty arises from the first words of the separation deed—namely, “and they have now agreed to live separate and apart.” That is evidence of contractual separation, and it must be disturbed B before there can be a finding of desertion in this case. There is some material which may enable the court to reach that conclusion. The deed seems to show evidence of some one having adapted an unhappy precedent. It is difficult to see why it should have been necessary to express an admission of desertion by the wife and an agreement by C both of them to live separate and apart. When the deed is read in the light of the evidence, it goes some way to enable the court to come to the conclusion that there was no real agreement. One must regard the separation deed as one regards all the other facts and ascertain the real state of mind of the parties. It is clear that the respondent D had a full and complete *animus deserendi* up to July 1, 1937. She admits that she left her husband without reasonable cause, and she admits that she refuses to return to him. After she had entered into the deed, she was asked to return to her husband, but she refused to do so. There is sufficient to show that the petitioner never consented to that E deed as a deed of separation, because his mind never went with it. The deed is a nullity. It is the true mind of the parties which has to be ascertained, and the legal position is dependent on that.

SIR WILFRID GREENE, M.R. [delivering the judgment of the court]: F On May 26, 1936, the respondent deserted the appellant without cause, and since that date the parties have lived apart. The petition is based upon the allegation that the desertion so commenced was continuing during a period of 3 years and upwards immediately preceding the presentation of the petition. SIR BOYD MERRIMAN, P., dismissed the petition on G the ground that this allegation had not been proved. The reason for this decision was that on July 1, 1937, the parties had executed a separation deed. That deed recites that on May 26, 1936, the respondent without reasonable excuse had wilfully left the petitioner and had refused to return to him, and that they had agreed to live separate and apart H from each other for the future. It went on to provide in cl. 1 that the parties would thenceforth live separate from each other, and that neither of them would take proceedings against the other for restitution of conjugal rights. By other clauses in the deed, the appellant covenanted to pay weekly sums to the respondent and for the maintenance of the

only child of the marriage, and provision was made with regard to access to the child and her schooling. On numerous occasions both before and after the execution of this deed, the appellant tried to persuade the respondent to return to him. It is clear that, so far as he was concerned, he was throughout anxious to bring about a reconciliation,

A but the respondent persisted in her refusal to return.

It is with regret that we find ourselves unable to assist the appellant, since, as will presently appear, he executed the separation deed under a misapprehension. The result is to inflict upon him hardship from which we have no power to relieve him. By the very terms of the deed,

B the separation was made consensual. After its execution, it was impossible for the appellant to assert that the respondent was continuing in a state of separation without his consent, however anxious he was that she should return to him and however hard he may have tried to induce her to do so. The consent which by the deed he gave

C was valid and effectual in law. If he had sued for restitution of conjugal rights, the deed would have been a complete answer. As long as it remained an effective instrument, the respondent had good cause for refusing to return. The fact that even without the deed she would not have returned—as in all probability was the case—cannot, in our view,

D affect the matter. It is sufficient that the separation was one to which the appellant was a consenting party, and, therefore, the respondent was entitled to rely on his consent as absolving her from resuming cohabitation.

Reliance was placed on the recent decision of this court in *Pardy* v. *Pardy* (1), but that was a very different case. There the separation deed had been repudiated by the deserting spouse, and both parties had treated it as a dead letter which no longer regulated their marital relations. Nothing of the kind has happened in the present case, since the separation deed has always remained an effective and binding

F instrument. In the judgment of SIR WILFRID GREENE, M.R., in *Pardy* v. *Pardy* (1), with which MACKINNON and FINLAY, L.JJ., agreed, he pointed out (what indeed is obvious) that the absence of consent by the spouse alleging desertion was necessary before it could be said that desertion without cause existed. In the present case, consent

G was given in the most formal and solemn manner, and could not be withdrawn so long as the deed remained in effective operation.

It appeared from the evidence of the appellant that the real purpose of the separation deed was, in the minds of both parties, to regulate the financial position and to make provision with regard to the child.

H If the deed had been confined to these matters, no difficulty would have arisen. The appellant, moreover, understood the advice given to him by his legal advisers as meaning that the execution of the deed in the form which it actually took would not prevent him from obtaining a dissolution of the marriage on the ground of desertion should he at any time desire to do so. In this belief he executed the deed, and,

as we have already said, the result is one of great hardship. It was argued that the court was entitled to disregard the deed in view of the appellant's misapprehension as to its effect and to treat the case as though he had never given his consent to the separation. It is not, in our opinion, open to the court to take that view of the matter. The decision of SIR BOYD MERRIMAN, P., was right, and the appeal must accordingly be dismissed. A

Appeal dismissed. Leave to appeal to the House of Lords.

Solicitors: *Kenneth Brown, Baker, Baker* (for the appellant); *Lewis & Lewis* (for the respondent).

[Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.] B

COLLIER v. SUNDAY REFEREE PUBLISHING CO., LTD.

[KING'S BENCH DIVISION (Asquith, J.), August 9, 1940.] C

Master and Servant—Contract of service—Breach of contract by destruction of servant's post on sale—Breach not waived by subsequent acceptance of amounts equal to salary—Engagement as chief sub-editor of newspaper—Sale of newspaper during contract period—Servant's services not retained by purchasers. D

The plaintiff entered into a contract of service with the defendants whereby he was appointed chief sub-editor of their newspaper for a certain period at a weekly salary. During the contract period the defendants sold their newspaper and the purchasers did not retain the services of the plaintiff. For some months after the sale the defendants continued to pay the plaintiff weekly sums equal in amount to his salary. Ultimately the plaintiff failed to attend any longer at the defendants' offices and they thereupon ceased to make any further payments to him, contending that they were not bound to provide the plaintiff with work, but merely to continue to pay his salary, retaining the right to call upon him to do work for them, and that by refusing to attend at their offices he had repudiated the contract with them. They also contended that the plaintiff had waived any alleged breach by continuing to accept salary after the sale of the paper :— E F

HELD: (i) as the plaintiff had not been engaged to do the type of work commonly done by any chief sub-editor, but as the chief sub-editor of a specific newspaper, the defendants had, by selling the newspaper, destroyed the office to which they had appointed him, and had, therefore, committed a breach of contract.

(ii) as the plaintiff was entitled to damages for breach of contract, the sums which he had accepted were accepted on account of damages, and there had, in consequence, been no waiver of the breach. G

[EDITORIAL NOTE.] The main question at issue here is whether the contract of service was a contract under which the employee was to be provided with, and allowed to work at, a specific task, or whether it was simply a contract under which the employers were not bound to provide the employee with work, but merely to continue to pay him a salary, reserving the right to call upon him to do work for them. The second is the more usual type of case, the obligation to provide work being an obligation of an unusual character, but it is here held that, as the plaintiff had been engaged as chief sub-editor of a specified paper, the contract imposed an obligation upon the defendants to employ him in that capacity upon that paper. That being the case, it followed that the action of the defendants in selling the H

paper during the subsistence of the contract, and thus destroying the post to which they had appointed the plaintiff, amounted to a breach of contract.

AS TO INTERPRETATION OF CONTRACTS OF SERVICE, see HALSBURY, Hailsham Edn., Vol. 22, pp. 138, 139, para. 228; and FOR CASES, see DIGEST, Vol. 34, pp. 49-51, Nos. 245-259.]

Cases referred to :

- A (1) *Marbe v. George Edwardes (Daly's Theatre), Ltd.*, [1928] 1 K.B. 269; 42 Digest 911, 71; 96 L.J.K.B. 980; 138 L.T. 51.
- (2) *Lagerwall v. Wilkinson, Henderson & Clarke, Ltd.* (1899), 80 L.T. 55; 34 Digest 106, 789.
- (3) *Turner v. Sawdon & Co.*, [1901] 2 K.B. 653; 12 Digest 621, 5121; 70 L.J.K.B. 897; 85 L.T. 222.
- B (4) *Driscoll v. Australian Royal Mail Steam Navigation Co.* (1859), 1 F. & F. 458; 34 Digest 99, 734.

C ACTION for damages for wrongful dismissal. On July 3, 1937, the defendant company, who then owned the *Sunday Referee*, entered into a contract of service with the plaintiff under which he was appointed chief sub-editor of the *Sunday Referee* for a period of 12 months as from Sept. 1, 1937, at a salary of £13 13s. per week. By two letters dated respectively Aug. 19 and 23, 1938, the contract was renewed for a further period of two years from Sept. 1, 1938, to Aug. 31, 1940. It was agreed that for the first of those two years the plaintiff was to receive a salary of £16 16s. per week, and for the second a salary of £17 17s. per week. On June 11, 1939, the defendant company sold the *Sunday Referee* to another company, which did not retain the plaintiff as chief sub-editor. The main question at issue was whether the defendant company's action in so disposing of the newspaper amounted to a breach of the plaintiff's contract of employment and to a wrongful dismissal of the plaintiff. From June, 1939, to Nov. 1, 1939, the defendant company continued to pay to the plaintiff weekly sums equal to the amount of the salary payable under the contract. From Nov., 1939, the plaintiff ceased to attend at the defendant company's offices. The defendant company thereupon ceased to make any further payments, contending that the plaintiff had repudiated his contract with them by failing to attend any longer at their offices. They further contended that by accepting the weekly payments after the date of the sale the plaintiff had waived the alleged breach of contract.

D. A. Scott Cairns for the plaintiff.

B. J. M. MacKenna for the defendants.

H ASQUITH, J. [after stating the facts]: The plaintiff contends that the defendants, by ceasing to publish the *Sunday Referee*, disabled themselves from performing further their contractual obligation to employ him as chief sub-editor of that newspaper. The defendants contend that they were not bound to provide the plaintiff with work, but merely to continue to pay his salary, retaining the right to call upon him

to do work for them, that they did continue to pay his salary until Nov., 1939, but that then the plaintiff finally repudiated his alleged obligation to work for them when required so to do, and that the contract of service, alive until then, was terminated by such repudiation, and that with it went any obligation on their part to pay further salary. It is true that a contract of employment does not necessarily, or perhaps A normally, oblige the master to provide the servant with work. Provided that I pay my cook her wages regularly, she cannot complain if I choose to take any or all of my meals out. In some exceptional cases there is an obligation to provide work—where, for instance, the servant is B remunerated by commission, or where (as in the case of an actor or singer) the servant bargains, among other things, for publicity, and the master, by withholding work, also withholds the stipulated publicity: see *Marbe v. George Edwardes (Daly's Theatre), Ltd.* (1). Such cases are, however, anomalous, and the normal rule is illustrated by such cases as *Lagerwall v. Wilkinson, Henderson & Clarke, Ltd.* (2) and *Turner v. C Sawdon & Co.* (3), where the plaintiffs—a commercial traveller and a salesman respectively, retained for a fixed period and remunerated by salary—were held to have no legal complaint so long as the salary continued to be paid, notwithstanding that, owing to the action of their respective employers, they were left with nothing to do. The employer D was not bound to provide work to enable the employee to “keep his hand in,” avoid the reproach of idleness, or even make a profit out of travelling allowances. In such a case there is no breach of contract, but the result is much the same as if there had been, since in either event the plaintiff is entitled to a sum or sums of money which are measured, E *prima facie*, by the amount of salary in respect of the unexpired period of service. The question is whether the present case is such a case as that. I am of opinion that it is not. The plaintiff was not employed to perform certain functions at large. He was not engaged to do the kind of work commonly done by any chief sub-editor, but was employed F to be the chief sub-editor of a specific Sunday newspaper, and the defendants made it impossible for him to remain so by discontinuing publication of that newspaper. By so doing they destroyed the office to which they appointed him. I cannot doubt that that is a breach of contract. The case somewhat resembles *Driscoll v. Australian Royal Mail Steam G Navigation Co.* (4), where the defendants contracted to employ the plaintiff on a particular ship belonging to them and then sold it, as a consequence of which the plaintiff lost his employment. He was held to have a clear cause of action. Thus, in this case, the sale of the newspaper on June 11, 1938, operated, in my view, as an improper dismissal of the H plaintiff, and can be treated by the plaintiff as such unless by some subsequent action he has precluded himself from availing himself of it. The defendants alleged that the plaintiff had so precluded himself because he continued until Nov. 1 to accept weekly sums which were equal in amount to this contractual salary and were often tendered to

him under the designation of "salary." Alternatively, the defendants alleged that a substituted agreement was arrived at by letters passing between the parties in June, 1939, under which the plaintiff, while retaining the right to salary, was bound to continue to render the defendants such services as they might reasonably require him to perform, that he
 A received his salary until Nov. 1, but that on that date he finally repudiated the obligation to do any work for the defendants and thereby ceased to be entitled to any payments after that date. Lastly, the defendants said that, if the letters relied on did not contain such a substituted agreement, yet it was to be spelt out from the proposals for such an agreement
 B contained in the letters, together with the plaintiff's subsequent acceptance of sums tendered as salary, which was relied on as an acceptance by conduct of the proposals in question.

Taking those grounds of defence somewhat out of their order, I hold, first, that the letters taken by themselves do not contain any substituted
 C agreement. An essential term in the defendants' proposals was the right of the defendants to require the plaintiff to work for them, and that right the plaintiff categorically and repeatedly refused to concede, in particular by his letters of June 16 and July 3 and 7. There remains the question whether the plaintiff's conduct in accepting the weekly payments from
 D June to Nov. 1 operates either as waiving the breach of the original agreement or as precluding him from relying on it, or, alternatively, operates as an acceptance of the proposals for a substituted agreement. I hold that the conduct relied on does not operate in either of those ways. The plaintiff's attitude is consistent throughout. He is saying: "You
 E have wrongfully dismissed me and the agreement is at an end. I am not bound to do any work for you at all, and I am entitled to damages, the amount of which is measured, *prima facie*, and subject to mitigation, by the salary of which you have deprived me. Any sums which you pay me will be accepted on account of the damages which you owe me."
 F If the plaintiff had not been entitled to the sums which he accepted as damages, but could be entitled to those sums only as salary under the original or some substituted agreement, then a different inference might be drawn from his acceptance of them, but, as he was, in my judgment, entitled to those sums as damages, no such inference can be drawn.
 G For these reasons I hold that the plaintiff is entitled to damages in respect of the period from Nov. 1, 1939, onwards. I find that he used all reasonable diligence in mitigating damage by trying to find other work. He obtained no alternative employment until May 24, 1940, when he was engaged by the British Broadcasting Corporation at a
 H salary of £405 per annum, which is £7 16s. per week. The post was a temporary one of a maximum duration of 6 months, but subject to a week's notice within that period. As to the period from Nov. 1, 1939, to May 24, 1940, he is accordingly entitled to damages at the rate of £17 17s. per week, and as to the period from May 24, 1940, to Aug. 31, 1940 (when the broken contract would have expired), he is

entitled to damages at the rate of £17 17s. per week, less £7 16s. per week—that is, £10 1s. per week.

Judgment for the plaintiff for £666 6s. 4d. and costs.

Solicitors: *Dehn & Lauderdale* (for the plaintiff); *Lawrance, Messer & Co.* (for the defendants).

[Reported by D. K. BELCHER, Barrister-at-Law.]

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MANSER v. MANSER (KING'S PROCTOR SHOWING CAUSE).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Langton, J.), **August 30, 1940.**]

B

Divorce—Intervention after decree nisi—Decree granted on ground of presumption of respondent's death—Respondent still alive—Whether a material fact—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 183 (2)—Matrimonial Causes Act, 1937 (c. 57), s. 8.

A wife obtained a decree *nisi* on the ground of the presumed death of her husband. It being subsequently proved that the respondent was alive, the King's Proctor intervened to show cause why the decree *nisi* should not be made absolute:—

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HELD: the fact that the respondent was alive was a material fact within the meaning of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 183 (2), and was a sufficient reason why the decree *nisi* should not be made absolute. The decree *nisi* must, therefore, be rescinded.

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[EDITORIAL NOTE. After a decree *nisi* has been granted and before it has been made absolute the King's Proctor or any member of the public may intervene to show cause why the decree should not be made absolute. One of the reasons why a decree should not be made absolute is that material facts have not been brought before the court. There appears, hitherto, to have been little authority on the question as to what are material facts sufficient to have the decree rescinded, but it is here held that the fact that a respondent who had been presumed dead for the purposes of a decree *nisi* under the Matrimonial Causes Act, 1937, s. 8, was in fact alive at the relevant time was such a material fact. Having regard to the regularity with which a decree absolute follows a decree *nisi*, some might be led to suppose that the obtaining of a decree *nisi* entitled the petitioner to a decree absolute more or less as a matter of course; but, as was pointed out in *Fender v. St. John-Mildmay* (2), the decree *nisi* is of a purely provisional nature, and does not alter the matrimonial status of the parties. In these circumstances it is difficult to imagine how a decree *nisi* granted on the presumed death of the respondent could be allowed to stand once it had been proved that he was in fact alive at the date of the decree. The case is also of interest as being the first reported case under the provisions of the 1937 Act relating to the granting of decrees on the presumption of death.

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AS TO SHOWING CAUSE AGAINST A DECREE, see HALSBURY, Hailsham Edn., Vol. 10, pp. 770, 771, para. 1216; and FOR CASES, see DIGEST, Vol. 27, pp. 479-483, Nos. 5067-5134.]

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Cases referred to:

- (1) *Parkinson v. Parkinson*, [1939] P. 346; [1939] 3 All E.R. 108; Digest Supp., 161 L.T. 251.
- (2) *Fender v. St. John-Mildmay*, [1938] A.C. 1; [1937] 3 All E.R. 402; Digest Supp.; 106 L.J.K.B. 641; 167 L.T. 340.

INTERVENTION by the King's Proctor showing cause why a decree *nisi* granted to the petitioner, Florence May Manser, on the ground of the presumed death of her husband, Charles Herbert Manser, should be rescinded because her husband was alive at the time when the decree *nisi* was granted and is still alive. The parties were married on Aug. 26,

- A 1922. On June 27, 1939, the petitioner presented a petition for divorce against her husband on the ground of desertion, but HODSON, J., refused to grant a decree because the parting between the spouses took place on the terms of a deed of separation. The judge, however, granted an adjournment to allow the petitioner an opportunity to consider whether
- B there was not some other ground on which her petition could be based. On July 11, 1939, the petitioner presented an amended petition wherein she alleged that the respondent left her in Aug., 1929, that she last saw him in a street at Brighton in Aug. or Sept., 1930, and that he was last heard of by her during Mar. or Apr., 1931, though his address at that
- C time was unknown to her. On the basis of these allegations, which were duly proved in evidence, HODSON, J., granted the petitioner a decree *nisi* on the grounds set forth in the Matrimonial Causes Act, 1937, s. 8. The King's Proctor filed his plea on Jan. 26, 1940, alleging "that the decree was obtained contrary to the justice of the case by reason of the
- D following material fact not having been brought to the notice of the court—namely, that on Oct. 4, 1939, the respondent was alive."

P. R. Hollins (for S. E. Karminski on war service) for the King's Proctor.

W. R. K. Merrylees for the petitioner.

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LANGTON, J.: The point which arises for decision is whether the fact that the respondent has been proved to have been alive at the time when the decree *nisi* was granted and to be still alive now affords good cause for rescinding the decree *nisi*.

- F Counsel for the petitioner argued that the fact that the respondent was now proved to be alive and to have been alive on Oct. 4, 1939, was a matter of no significance in these proceedings. The Matrimonial Causes Act, 1937, s. 8 did not deal with the question of the life or death of the respondent, but only with the grounds set out in the section which
- G would justify a decree *nisi* being granted. Thus, in subsect. (1), the court has only to satisfy itself that reasonable grounds exist on which the petitioning spouse may suppose that the other spouse is dead, and, if the court is satisfied that reasonable grounds exist, a decree of presumption of death may be made. Similarly, in subsect. (2), where a period
- H of 7 years or upwards has elapsed during which the respondent has been continually absent from the petitioner, and the petitioner has no reason to believe that the respondent has been alive within that time, these two facts shall be evidence that the respondent is dead until the contrary is proved. As regards subsect. (2), counsel for the petitioner argued that the final words did not permit of the contrary being proved after decree

nisi, because the object in view was not to establish whether in point of fact the respondent was dead or alive, but whether, on the day on which the evidence was taken, the facts, so far as then known, were such as to justify the court in taking action on the grounds set out in the subsection. In reply to this argument, counsel for the King's Proctor pointed to subsect. (3), whereby a *fasciculus* of sections included in the Supreme Court of Judicature (Consolidation) Act, 1925, are expressly retained in their application to this section. These clauses are precisely those which provide in terms for interventions by the King's Proctor or by a member of the public, and form an awkward obstacle to the petitioner in the present case. The Supreme Court of Judicature (Consolidation) Act, 1925, s. 183 (2) is as follows :

After the pronouncing of the decree *nisi* and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit.

In answer to the point that the King's Proctor was in the present instance bringing forward the material fact that the respondent was alive, which had not been brought before the court when the decree *nisi* was granted, counsel for the petitioner contended, first, that the fact was not material, and, secondly, that in the present context material facts should be construed as *ejusdem generis* with collusion. The first of these points, which is, of course, a restatement of his original contention, merits most careful consideration, but the second seems to me to possess more than one defect.

To deal with the second point first, the *ejusdem generis* rule of construction depends, as I have always understood it, on the existence of certain general words which can be said to define and limit the application of the other more particular terms employed in the same context. For my own part, I have known it hitherto as a rule for the construction of documents rather than of statutes, and, in endeavouring to apply it to the present section, I should be at a loss to imagine a genus which embraces both collusion, which connotes intention, and material facts, which, as in the present case, are innocently withheld, thus excluding intention. Again, testing the matter by experience, the material facts which are constantly brought to the notice of the court in this connection have no relation at all to the subject of collusion and could not by any stretch of imagination be generically so connected. I cannot believe that this point is a sound one.

Turning, then, to the first and more substantial point, the only case which was cited to me as a reported decision on this section of the Act was a decision of BUCKNILL, J., in *Parkinson v. Parkinson* (1). Neither counsel, however, claimed that the judgment in that case was addressed to the particular point which is here raised. In so far as it is an authority for the proposition stated in the headnote that absence under a deed

of separation does not debar the petitioner from claiming the advantage given by the Matrimonial Causes Act, 1937, s. 8 (2), I gladly follow this authority, but otherwise the case is not in point. The substance of the contention of counsel for the plaintiff, as I understand it, is that subsect. (2) must in no circumstances be read as if there were a comma
A between the words "dead" and "until." That is to say, that the last 6 words of the subsection, "dead until the contrary is proved," must be read together, and thus the facts set out in the preceding words of the subsection are to be treated as constituting the evidence necessary for a decree. Read in this way, the term during which the contrary may be
B proved is limited to the time before the decree *nisi* is granted.

Treating the matter first from the point of view of first impressions, I must own that this construction of the subsection strikes me as slightly artificial. However, it is certainly not impossible, and acquires some attractions when one commences to speculate on the possible objects of
C the framers of the Act. When, however, one enters seriously on this latter line of thought, the pointed inclusion of the sections preserving the King's Proctor's duties gains additional weight and force. Read naturally and simply, it appears to me that full value can be given to every word in the section if it be taken to allow the court to act on the facts
D set out in subsects. (1) and (2) respectively to the extent of granting a decree *nisi* on proof of either of these sets of facts, but at the same time to reserve and preserve in subsect. (3) a right to recall such decree if material facts come to light within the prescribed period which contradict or destroy the facts or presumptions on which the decree
E was granted.

Further, in weighing this point, it seems to me immaterial to consider the nature and function of the decree *nisi*. In a much-discussed case of breach of promise of marriage—namely, *Fender v. St. John-Mildmay* (2)
F—the nature of the decree *nisi* was considered and explained. There was a deep divergence of opinion amongst the Lords who heard this case on the specific question at issue, but I do not find so great a difference between them on what was there a subordinate question—namely, the nature of a decree *nisi*. LORD RUSSELL OF KILLOWEN, in his dissenting opinion, sums the matter up in the following language, at
G p. 28 :

The decree *nisi* as I understand it effects nothing. It does not dissolve the marriage. The parties are just as much man and wife as they were before. It is true that the right to consortium could not be enforced; that duty or obligation between spouses is no doubt in suspense. So it is once a petition for divorce has been presented. Other duties or obligations, however, remain. The duty or
H obligation to refrain from sexual intercourse with others, surely continues. To break it would be to commit adultery, just as much as to marry another would be to commit bigamy.

LORD ATKIN, delivering the leading opinion of the majority, pointed out, at p. 16, that the normal obligations and conditions of marriage in ordinary circumstances disappear after decree *nisi*, but he accepts as a

matter of course the propositions of LORD RUSSELL OF KILLOWEN concerning the continuance of status, and as to obligations in restraint of intercourse until the marriage is dissolved by decree absolute. Finally, LORD ROCHE, who was also a dissident to the main decision, said, at p. 53 :

The decree *nisi* operates only in the future and when the court sees fit to make it absolute, and I need not repeat what has been truly said by my noble and learned friend LORD RUSSELL OF KILLOWEN as to the continued subsistence of the married status of the parties to the marriage after a decree *nisi* and as to the bearing of that fact upon questions of adultery and of reconciliation. A

These weighty expressions of opinion, though not directly in point to the issue which here falls to be considered, bring into sharp relief the inchoate, temporary and provisional character of a decree *nisi* in divorce matters. They do nothing to assist the contention that, where circumstances which, as presented in the first instance, have justified the granting of a decree *nisi* can be shown before a decree absolute is granted to have been presented incompletely or in error, the decree *nisi* cannot be recalled. B

If one turns from this indirect guidance to the language of the actual decree in this present case, it reads as follows : C

The judge . . . decreed that the marriage . . . be dissolved by reason that since the celebration thereof the court has presumed the death of the said respondent Charles Herbert Manser unless sufficient cause be shown to the court why this decree should not be made absolute within six months from the making thereof. D

There is nothing in this language to suggest irrevocability. There is at least something to presume time and opportunity for reconsideration.

One is accordingly driven back to a consideration of whether the fact that the respondent is alive is or is not a sufficient cause why the decree should not be made absolute. If it be right to consider that the decree *nisi* is, as its name and form suggest, a provisional order only, and one which, by express reservation of words contained therein, will not operate in certain events, it seems difficult to my mind to imagine a fact more material, or an event more compelling, to the whole circumstances of this case than the fact that the respondent is alive. If, of course, the plain language and clear intention of the statute inevitably lead one to the conclusion that so stubborn and corporeal a fact ought to be ignored, it would be the duty of the court to close its eyes to the existence of the respondent. To my mind, for the reasons I have given, I think that the language of the Act points in the opposite direction. E

In the present instance, I am not without sympathy for the petitioner, who appears to have been to all intents and purposes deserted by her husband, although debarred from setting up that desertion as a ground for the dissolution of her marriage. Apart, however, from what I may call the private merits of the particular case, I cannot feel sorry that the language of this statute does not appear to drive me to the extremity of allowing these proceedings to continue on the footing of the presumption of death of an individual who is admittedly alive. To my mind, the F

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paradox involved would be preposterous, and the absurdity both patent and grotesque.

Decree nisi rescinded.

Solicitors: *The King's Proctor; Smith, Rundell, Dods & Bockett*, agents for *W. W. Pearson*, Chatham (for the petitioner).

A [Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

REIGATE CORPORATION v. CATTERMOLLE.

[KING'S BENCH DIVISION (Lawtence, J.), **October 25, 1940.**]

B *Income Tax—Deductions against profits—Undertaking sterilised for purposes of centralisation of supply—Rates and fire insurance premiums on generating station—Income Tax Act, 1918 (c. 40), Sched. D, Cases I and II, rr. 3, 5 (1).*

C The Reigate Corporation, who had been suppliers of electrical energy in their district, entered into an agreement whereby current was to be generated only for supply to the grid of the central authority. The consideration for their entering into this agreement was certain capital and indemnity payments which, in previous proceedings, had been held not to be trade receipts of the corporation. The agreement, however, did not provide for the payment of, or any indemnity against, the rates payable in respect of the generating station nor the fire insurance premiums upon the building and the machinery therein.

D The question arose whether, since the generating station upon the finding in the previous proceedings was not producing trade receipts, the rates were proper deductions as necessarily incidental to the tax-payers' trade, and undertaken solely for the purposes of that trade:—
HELD: both the amount paid in respect of rates and that in respect of fire insurance were proper deductions for the purposes of income tax.

E [EDITORIAL NOTE. It might be thought that an undertaking which was not producing trade receipts could not have deductions against trade receipts. The facts here, however, are exceptional in so far as the trading is concerned, but, in the course of centralisation of public services, they seem likely to recur from time to time.

F AS TO TRADE EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 152, 153, para. 312; and FOR CASES, see DIGEST, Vol. 28, pp. 45, 46, Nos. 227-236.]

Cases referred to:

- (1) *Inland Revenue Comrs. v. Falkirk Iron Co., Ltd.*, [1933] S.C. 546; Digest Supp.; 17 Tax Cas. 625.
(2) *Allied Newspapers, Ltd. v. Hindsley*, [1937] 2 All E.R. 663; Digest Supp.; *affd.*, [1937] 4 All E.R. 677; 21 Tax Cas. 422.
G (3) *Hyett v. Lennard*, [1940] 2 K.B. 180; [1940] 3 All E.R. 133; Digest Supp.

CASE STATED by the Income Tax Commissioners for the opinion of the King's Bench Division of the High Court of Justice.

H The facts may be shortly stated as follows. The Reigate Corporation, who were undertakers for the supply of electricity in their district, agreed with the central electricity authority for the sterilisation of their generating station. The reason for the agreement was the centralisation of the supply of electrical energy. The effect of the agreement was that electric current was to be generated only for the convenience of the central authority and the corporation were to be indemnified in

respect of the cost of such generation as the agreement provided for. The corporation, however, had to make certain payments—namely, rates and insurance premiums—which were not provided for by the agreement and in respect of which no indemnity was thereby given. It had been decided that the payments made under the agreement were not trade receipts, being of the nature of capital and indemnity payments, and the question arose whether, there being, therefore, no trading receipts in respect of the electricity undertaking, the rates and insurance premiums were payments made solely for the purposes of trade, and, as such, proper deductions in arriving at the assessment for income tax purposes. A B

Cyril L. King, K.C., and F. Grant for the taxpayers.

The Solicitor-General (Rt. Hon. Sir William Jowitt, K.C.) and Reginald P. Hills for the inspector of taxes.

LAWRENCE, J.: The main dispute upon these points turns upon whether the overhead expenses incurred at the generating station under the agreement ought to be regarded as having been incurred for the purposes of the taxpayers' trades, in view of my decision that the payments received by the corporation were not trading receipts. In my opinion, it does not follow from my decision that the generating station ought to be regarded as no part of the taxpayers' undertaking. What I decided was that the principal payments received under the agreement were in their true quality capital, and not income, and that the other payments were indemnity payments for generation of electricity for and on behalf of the authority. I took, and take, the view that the effect of the agreement was to provide for the sterilisation of the generating station over a period of years, during which it should be operated for the convenience of the authority, and that the council should be compensated for this sterilisation and indemnified for the running costs of the generation provided for. However, as to such expenses as the council were not indemnified against—for example, rates—I can see no reason why it should be thought to be implicit in my former judgment that these expenses were not incurred for the purposes of its trade. C D E F

The ownership and the occupation of the generating station were necessarily incidental to the trade of the council, and the generating station was, therefore, in my opinion, occupied for the purpose of their trade within the meaning of Sched. D, Cases I and II, r. 5 (1), and rates thereon were wholly and exclusively laid out for the purposes of their trade within the meaning of r. 3. G

It is clear on the authorities that the rent of premises acquired for the purposes of a taxpayer's trade, but subsequently not required for those purposes, is an expense which can be deducted: *Inland Revenue Comrs. v. Falkirk Iron Co., Ltd.* (1), *Allied Newspapers, Ltd. v. Hindsley* (2) and *Hyett v. Lennard* (3). However, it is argued for the Crown that, though that may be true of rent payable under a lease which was entered H

into for the purposes of the taxpayer's trade, yet it is not true of the beneficial occupation which gives rise to the annual liability for rates. This argument might be sound if the beneficial occupation of the taxpayer were unconnected with the trade for the purposes of which the premises were originally acquired, but, in the present case, the beneficial
 A occupation of the generating station, though not, in my opinion, immediately producing trading receipts, was necessarily incidental to the taxpayers' trade, and was undertaken solely for the purposes of that trade.

I think that the same reasoning is applicable to the insurance premium
 B in question. The council were not indemnified against these premiums, which were for fire insurance, and not for breakdown insurance, and were incurred solely for the purpose of keeping the generating station ready for use in accordance with the agreement. They were, therefore, in my opinion, expenses incurred for the purposes of the council's trade
 C within r. 3. On this point, I see no difference between the insurance on the fabric and the insurance on the machinery, and on this point, therefore, I disagree with the commissioners.

Solicitors: *Heber Davies*, Town Clerk, Reigate (for the taxpayers);
Solicitor of Inland Revenue (for the inspector of taxes).

D [Reported by D. K. BELCHER, Barrister-at-Law.]

Re BALL, LUCAS v. BALL AND OTHERS.

[CHANCERY DIVISION (Farwell, J.), **October 16, 1940.**]

E *Executors—Legacies—Annuities to several persons free of tax—Rights of survivorship on death of any person—Death of one annuitant—Date at which valuation of annuities should be made—Rate of income tax and allowances.*

The testator by his will gave to his wife, his son and his daughter
 F the sum of £200 for life free of tax with rights of survivorship. He also gave an annuity of £300 to J. M. G. for life, and an annuity of £100 to his sister for life, and made various other bequests. The son died after the death of the testator but before the date of the summons:—

HELD: (i) the annuities should be valued as at the date of the order.

(ii) the income tax and allowances should be computed at the rates
 G ruling at the same date.

[EDITORIAL NOTE. This short case decides a matter of administration which has given trouble in the past. At the present time, the date at which the rate of income tax is to be taken is perhaps the more important, as the rate of that tax is not only likely to increase but the amount of the increase is a matter impossible to forecast.

H AS TO VALUATION OF ANNUITIES, see HALSBURY, Hailsham Edn., Vol. 14, pp. 358, 359, para. 669; and FOR CASES, see DIGEST, Vol. 23, pp. 420, 421, Nos. 4913-4926.]

ADJOURNED SUMMONS to determine, *inter alia*, (i) if the annuities given by the will of the testator, John Henry Ball, have to be valued, at what date the valuation should be made, (ii) for the purpose of

valuing an annuity given free of income tax, (a) whether the income tax to be considered is income tax at the standard rate payable at the death of the testator or at the date of the order, and (b) whether the allowances to which any annuitant may be entitled under the Income Tax Acts ought to be taken into consideration, and, if so, in what manner. The testator made his will on Mar. 18, 1938, and died on June 16, 1938, and the will was proved on May 17, 1939. By his will, he gave to his wife, his son and his daughter the sum of £200 free of tax for life. In the event of the demise of any of the three aforementioned, the share of the deceased was to be given to the survivors equally. He also gave June Manifold Gibson £300 per annum for life and his sister £100 per annum for life. He made various other dispositions and bequests. One of the annuitants, the son, John Brayfield Ball, died on Apr. 6, 1940.

L. M. Jopling for the plaintiff.

John Pennycuik for the first two defendants.

C. D. Myles for the third defendant.

J. A. Reid for the fourth defendant.

FARWELL, J. : I am satisfied that the proper date at which to value these annuities is the date of the order I am making to-day. I appreciate that it seems to be rather hard on the estate of the annuitant who has died, but, on the whole, I think that that is the proper way to deal with the matter. Up to the date of the order, the annuitants are entitled to the sums which they will have received in respect of the annuities—in the case of the first three persons, free of income tax—and, if there are any allowances, taking such allowances into consideration. When one ascertains the capital value of the £200 per annum, the calculation must be treated as being one to be made as at the present time, and, therefore, one must disregard for that purpose that one of the three persons is dead. The rate of income tax and the allowances will be those ruling at the date of the order.

Solicitors : *Sanderson, Lee & Co.* (for the plaintiff and for the fourth defendant) ; *Pritchard Englefield* (for the first two defendants) ; *Peacock & Goddard* (for the third defendant).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

WILLIAMS v. BOAG.

[COURT OF APPEAL (MacKinnon, Goddard and du Parcq, L.JJ.),
September 20, 1940.]

Practice—Payment into court with admission of liability—Defence subsequently amended by leave and admission of liability withdrawn—Money taken out by plaintiff—Defendant's right to withdraw notice admitting liability and to recover money paid in—R.S.C., Ord. 22, rr. 3, 6.

Where money is paid into court with an admission of liability, and the defendant subsequently obtains leave to amend his defence, the

notice admitting liability may be withdrawn, and, if the plaintiff does not continue the action, the money may be recovered by the defendant, even though the plaintiff may have taken it out. R.S.C., Ord. 22, r. 6, does not preclude a judge from being informed, on an interlocutory proceeding, that money has been paid into court.

[EDITORIAL NOTE.] If money has been paid into court under the provisions of R.S.C., Ord. 22, no communication of that fact shall at the trial of the action be made to the judge or jury until all questions of liability and amount of debt or damage have been decided. It is here held, however, that R.S.C., Ord. 22, r. 6, does not prevent a judge on an interlocutory application from being informed of the fact of payment in where it is desirable that he should know of it.

AS TO NON-DISCLOSURE OF PAYMENT INTO COURT, see HALSBURY, Hailsham Edn., Vol. 26, p. 64, para. 105; and FOR CASES, see DIGEST, Practice, pp. 498, 499, Nos. 1730-1735.]

Case referred to :

(1) *Frazer & Haws, Ltd. v. Burns* (1934), 49 Lloyd's L.R. 216.

C APPEAL by the defendant from an order of SINGLETON, J., dated July 15, 1940. The plaintiff brought an action to recover the sum of £500 alleged to be due under a policy of marine insurance insuring a steam drifter belonging to him against risks while it was laid up at West Mersea. In his defence the defendant pleaded that the cost of the repairs necessitated by the casualty amounted only to £100, and paid that amount into court with an admission of liability. When this payment in was made, neither the plaintiff nor the defendant knew that in fact the damage to the drifter in respect of which the plaintiff claimed occurred at Brightlingsea, which meant that the risk had not attached and that the defendant had a complete answer to the plaintiff's claim. When the mistake was discovered, the defendant applied for leave to amend his defence by withdrawing the admission of liability. The application was granted, but no mention was then made to the judge of the payment into court of the £100. The trial was fixed for July 15, 1940, and, a few days beforehand, the plaintiff applied for an order that the £100 be paid out to him and an order for such payment was made. The defendant appealed against the order.

P. A. Devlin for the appellant.

G *Cyril T. Miller* for the respondent.

Devlin : There is no provision by which the defendant can amend his defence if he has made an admission of liability by letter. It is absurd to allow a defendant to withdraw an admission and yet hold him bound by the fact that money has been paid into court. It is **H** unfair to the defendant to refuse leave to amend. If leave to amend is given, the plaintiff is not entitled to the £100 paid in. [Counsel referred to *Frazer & Haws, Ltd. v. Burns* (1).]

Miller : The real question in this case is whether or not the judge ought to have allowed the payment out. The plaintiff does not seek to take advantage of any technicality in R.S.C., Ord. 22, r. 3. The

difference of locality is a point which underwriters do not usually take, and, in the present case, there has been a mistake. Under R.S.C., Ord. 22, r. 2 (1), where money has been paid into court, the plaintiff may accept the whole sum in satisfaction of his claim. The only point is the difficulty which arises under r. 3. [Counsel referred to *Frazer & Haws, Ltd. v. Burns* (1).]

MACKINNON, L.J.: I do not know that it is necessary to deal with this case in any great detail. The only point which I think worth noticing is the suggested difficulty which is said to arise in the constitution of the rules under R.S.C., Ord. 22, with regard to payment into court. I do not agree that, if a man has paid money into court with an admission of liability, and subsequently finds that he has made a mistake and gets leave to amend his defence, it is then impossible for him to come to the court in some way or other and say: "Having regard to the new defence which I have been allowed to put up denying liability, I ought to have liberty to withdraw that notice of admission of liability and safeguard my right ultimately to have the money repaid to me." One method of doing that was indicated by the Court of Appeal in *Frazer & Haws, Ltd. v. Burns* (1). The Court of Appeal there said that it is simply a matter of giving leave to amend the defence, and the money paid into court shall then remain in court till the trial of the action. However, if, in such a case as this, it is admitted that the amendment of the pleadings raises an insuperable obstacle to any possible success by the plaintiff, I think that there must be inherent power in the court, on that state of facts being established, to order payment out of the money to the defendant, notwithstanding the fact that R.S.C., Ord. 22, r. 3, does not in terms contemplate such a possibility.

As I have said, I do not think that I need discuss this matter in any great detail. The result is that the order of the court will be that the appeal must be allowed, the plaintiff by his counsel stating that the amendment of the defence is an insuperable bar to the plaintiff's claim, and the action must be dismissed. The defendant must have the costs of the summons under appeal and the costs of this appeal. The plaintiff must have the costs of the action up to and including the amendment of the defence. The £100 must be repaid by the plaintiff to the defendant.

GODDARD, L.J.: I agree. I only want to add this one word. I think that it was unfortunate that the judge was not informed of this payment into court. There is no difficulty, in these circumstances, in informing a judge of a payment into court. R.S.C., Ord. 22, r. 6, provides as follows:

... no communication of that fact [that the money has been paid into court] shall at the trial of any action be made to the judge or jury until all questions of liability and amount of debt or damages have been decided ...

If this sort of point should arise again, when the judge is asked to allow an amendment of the pleadings, he ought to be told of the payment into court. Obviously he can be told then, and there is no prohibition in the rule against telling him. It was unfortunate, I think, in this case that the judge was not told at the time of the amendment that money had been paid into court. It should be made clear, I think, that R.S.C., Ord. 22, r. 6, does not prevent a judge on an interlocutory application from being informed of the fact of payment in, where it is desirable that he should know it.

DU PARCQ, L.J. : I agree, and I agree not only with what has been said by MACKINNON, L.J., but also with what has been said by GODDARD, L.J. It is a matter of some importance, because it would really lead to injustice very often if it were thought that the judge sitting in chambers could not be told that money had been paid into court. After all, this was a case of a judge sitting in chambers to deal with an interlocutory matter. I think that there would have been no difficulty, if the whole of the facts had been stated to the judge, in his making substantially the order we have made here. It would have meant that he would then have allowed the amendment and ordered (as no doubt, as MACKINNON, L.J., has said, he has power to do) that the notice should be withdrawn. Then it would have followed, either that the money should be paid out to the defendant, or, if the case had to go on, that it should remain in court. I agree with the order proposed by MACKINNON, L.J.

Appeal allowed.

Solicitors : *Ballantyne, Clifford & Co.* (for the appellant) ; *Kenneth Brown, Baker, Baker* (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

NOTE.

Re THORNHILL'S SETTLEMENT.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.),
October 21, 1940.]

The court dismissed an appeal by the tenant for life under the above settlement without calling upon counsel for either of the respondents, from a judgment of BENNETT, J., reported [1940] 4 All E.R. 83. In dismissing the appeal, SIR WILFRID GREENE, M.R., stated that he could see no ground whatever for criticising the order of BENNETT, J. In his opinion, it was right, and, in the circumstances, a most beneficial order. The appeal was dismissed with costs.

MURRAY v. MURRAY (BY HER GUARDIAN).'

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **October 23, 1940.**]

Divorce—Insanity—Detention as incurable patient for 5 years preceding presentation of petition—Necessity for continuation certificates—Lunacy Act, 1890 (c. 3), ss. 25, 37 (2), 341—Lunacy Act, 1891 (c. 65), s. 7—Matrimonial Causes Act, 1937 (c. 57), s. 3.

The petitioner sought a dissolution of his marriage on the ground that his wife had been detained as an incurable lunatic for a period of 5 years immediately preceding the presentation of the petition. The respondent appeared by a guardian *ad litem*. The lunacy and its incurability were not disputed. The respondent was admitted to a mental hospital in Aug., 1923, under a proper reception order, and, while she was in the mental hospital, the certificates required by the Lunacy Act, 1890, were duly given. In June, 1935, the respondent was discharged not recovered from the mental hospital and the medical officer of the mental hospital duly certified that she was a lunatic not recovered and a proper person to be kept in a workhouse as a lunatic, but the medical officer of the workhouse, to which she was then transferred, did not certify that the accommodation in the workhouse was sufficient for the lunatic's proper care and treatment, nor that the lunatic's condition was such that it was not necessary that she should be kept separate. The Lunacy Act, 1890, s. 25, requires that these certificates shall be given:—

HELD: (i) the detention of the respondent in the workhouse without the necessary certificate by the medical officer of the workhouse being issued was contrary to the Lunacy Act, 1890, s. 25, and, therefore, the respondent, after the transfer to the workhouse, was not detained in pursuance of an order under the Lunacy and Mental Treatment Acts, 1890 to 1930, as defined by the Matrimonial Causes Act, 1937, s. 3.

(ii) if the certificate by the medical officer of the workhouse had been given, then the detention of the respondent would have been in pursuance of the original reception order coupled with the certificates, but those certificates do not in themselves constitute a reception order.

(iii) *semble*: after the transfer in accordance with the Lunacy Act, 1890, s. 25, it is still necessary to keep the original reception order in force by the issue of the periodic reports and certificates required by the Lunacy Act, 1890, s. 38 (4), as amended by the Lunacy Act, 1891, s. 7.

EDITORIAL NOTE. This is a matter in which the construction of the relevant statutes does not appear to be in doubt, but is of importance because the authorities concerned have for years adopted and acted upon a different view of the sections in question. Owing to the hardship which may be caused in such cases, it may well be that some amendment to the Matrimonial Causes Act, 1937, will be made. The same point arose in *Hall v. Hall*, [1940] 1 All E.R. 192; Digest Supp., and this decision, in effect, approves the judgment in that case.

AS TO RATE-AIDED PATIENTS DISCHARGED FROM INSTITUTION AND DETAINED IN WORKHOUSE, see HALSBURY, Hailsham Edn., Vol. 21, p. 428, para. 743; and FOR CASES, see DIGEST, Vol. 33, p. 270, Nos. 1878-1880.]

APPEAL by the petitioner from an order of SIR BOYD MERRIMAN, P., dated July 3, 1940. At the date of the petition, the petitioner lived at New Cross. His wife, the respondent, both at the date of the petition and also at the date of the hearing, was in a London County Council institution. The petitioner asked for a decree of dissolution of the marriage on the ground that the respondent was incurably of unsound

mind and that she had been continuously under care and treatment for a period of at least 5 years before the date of the presentation of the petition. The Official Solicitor, as guardian *ad litem*, filed an answer in which the incurable unsoundness of mind was denied. That denial was not persisted in, so far as concerned either the unsoundness of mind or its incurability, but the point was taken that the respondent had not been "continuously under care and treatment," as the necessary certificates in such a case had not been given under the Lunacy Acts.

Noel Middleton, K.C., and *F. E. Sugden* for the appellant.

E. Holroyd Pearce for the respondent.

- B *Middleton, K.C.*: The reception order made in Aug., 1923, was perfectly valid. The respondent was properly detained at Bexley Mental Hospital under the provisions of the Lunacy Act, 1890, s. 38, as amended by the Lunacy Act, 1891, s. 7. Sect. 7 requires periodical reports and certificates in order that a reception order may continue in force. A certificate under this section would have become due in July, 1935. In June, 1935, the respondent was transferred to Leavesden, and a certificate was given, as required by the first part of the Lunacy Act, 1890, s. 25. Sect. 25 is sufficient to show that, at the time of removal of the respondent from Bexley to Leavesden, the reception order and the certificate, or subsequent certificates, were sufficient, because they remained in force. Leaving out of consideration for the moment the difficulty caused by the absence of the second certificate, one sees by sect. 25 that the medical officer shall certify that the lunatic may be received in a workhouse without any further order. That would put an end to the necessity of a certificate under the Lunacy Act, 1890, s. 38 (4). The patient was sent from Bexley to Leavesden under a proper certificate in accordance with sect. 25. Once the patient was properly in the workhouse at Leavesden, no further certificate or order was necessary, because of the words: "without further order." The second certificate required by sect. 25 is in the nature of a direction. There is not an absolute enactment of the necessity for the second certificate. If the procedure under sect. 25 is followed, no periodical certificate is required after the patient has been removed to a workhouse. The first certificate required by sect. 25 is for the protection of the lunatic. The second certificate is given for the protection of the authorities.

- Pearce*: The view taken by those administering the Lunacy Acts is that no continuation certificates are necessary where the procedure contained in the Lunacy Act, 1890, s. 25, has been followed. Sect. 37 (2) and sect. 38 (3) appear to deal with removals from one asylum to another. It may be that removal from an asylum to a workhouse is to be regarded as something different.

SIR WILFRID GREENE, M.R.: This is an appeal from a judgment of SIR BOYD MERRIMAN, P., dismissing a petition for dissolution of

marriage presented by the appellant. On Aug. 16, 1923, the appellant's wife was admitted to Bexley Mental Hospital under a reception order dated Aug. 15, 1923. She is, and has been for years, an incurable case. About that there is no dispute, and SIR BOYD MERRIMAN, P., so found. But for the difficulties to which I shall have to refer, the appellant has satisfied that part of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176, as amended by the Matrimonial Causes Act, 1937, which gives the right to a decree for dissolution of marriage in the case of a spouse who is incurably of unsound mind. On June 19, 1935, the wife was moved from Bexley Mental Hospital, which is one of the London County Council institutions, to Leavesden Mental Hospital, another institution conducted by that council.

The difficulties in the case arise from the manner in which that removal, that transfer, from the one institution to the other took place, and from what has happened since. In passing the Matrimonial Causes Act, 1937, the legislature required, in the case of persons incurably of unsound mind, that they should have been continuously under care and treatment for a period of at least 5 years immediately preceding the presentation of the petition. If the section had said no more than that, that requirement would have been amply satisfied, but the Matrimonial Causes Act, 1937, s. 3, proceeds to say that a person of unsound mind shall be deemed to be under care and treatment in certain specified circumstances "and not otherwise." The circumstances relevant to the present case are thus stated in the opening words of para. (a) of that section :

While he is detained in pursuance of any order or inquisition under the Lunacy and Mental Treatment Acts, 1890 to 1930.

Accordingly, before the appellant can succeed, he must show that his wife had continuously for at least 5 years immediately preceding the presentation of the petition been detained in pursuance of an order—I need not repeat the word "inquisition," which does not apply here—under the Lunacy and Mental Treatment Acts, 1890 to 1930. The machinery of the Lunacy and Mental Treatment Acts is complicated and technical. The safeguards which the legislature has laid down in those Acts, in order to ensure that detention on the ground of lunacy, or something short of lunacy, shall take place only in proper cases, are strict, and, unless they are strictly observed, the detention of an alleged lunatic is illegal. Accordingly, when the legislature laid down this stringent test, which must be satisfied before a person can be said to be under care and treatment, it required that that machinery should be carried out according to the letter of the law. This case shows, and other cases have shown, that that machinery under the Lunacy and Mental Treatment Acts in the case of pauper lunatics is very frequently—and I speak from some experience—not strictly carried out. Sometimes it happens through an oversight, and sometimes it happens through carelessness. Sometimes it happens, as we are told it has happened in

- this class of case, through a misapprehension as to the legal obligation. I cannot doubt, however, that there are many cases of pauper lunatics where, owing to some failure to put the proper machinery strictly into operation, a spouse will be deprived of the benefit of the Matrimonial Causes Act, 1937, and will be unable, on what very often must be a
- A highly technical ground, to obtain relief. In the present case, we are told that there has been a certain view taken as to the requirements of the Acts in cases of this kind. That view, which I shall refer to presently, is, in my opinion, a mistaken view. The fact that it has been taken and widely held must mean, if my opinion that it is mistaken is right, that
- B there are many cases where the Matrimonial Causes Act, 1937, for a technical reason, and for no reason of substance, will fail to operate, and it may well be that, if and when an amendment of that Act comes to be considered, the legislature will think it right to take that matter into consideration.
- C The original order of Aug. 16, 1923, was a reception order made by justices in the proper way, and, had the wife remained under that order at the Bexley Mental Hospital, no question could have arisen. Periodical certificates are required in order to keep a reception order in force under the Lunacy Act, 1891, s. 7, which substitutes a new subsect. (4) for the
- D original subsect. (4) of sect. 38 of the Act of 1890. That subsection requires that at stated intervals, beginning with a year and running up to 5 years, there must be a special report of the medical officer of the institution as to the mental and bodily condition of the patient, with a certificate certifying that the patient is still of unsound mind and a
- E proper person to be detained. Unless that report and those certificates are given, the reception order automatically expires. That is one of the safeguards which the legislature has laid down for the benefit and protection of persons detained under reception orders, and one would not expect to find that the Act would allow any case to exist where a
- F person detained as an alleged lunatic could be detained indefinitely without the necessity of periodical reports and certificates. In the present case, the reports and certificates required by that subsection were duly given, and the date of the expiration of the first five-yearly period would have been July 17, 1935—that is to say, about a month
- G after the transfer to Leavesden. On June 19, 1935, the clerk of the Bexley Mental Hospital sent a notice to the Board of Control, and we take it that that notice correctly states the facts. It gave notice that under sect. 25 the patient was discharged relieved to Leavesden Mental Hospital Annexe. On June 19, 1935, the discharge was effected on
- H the authority of two of the sub-committee of visitors, and there is a certificate bearing the same date by a doctor, who, I apprehend, was acting for the medical superintendent of the hospital, headed “Lunacy Act, 1890, s. 25, and Mental Treatment Act, 1930, s. 19,” certifying that the patient had not recovered, and that the doctor signing it was of opinion that she was a proper person to be kept in a workhouse or

hospital as a patient of unsound mind. It is clear, and no suggestion, I think, can be made to the contrary, that the authorities were intending to put into operation the machinery laid down under the Lunacy Act, 1890, s. 25, which provides as follows :

Where a pauper lunatic is discharged from an institution for lunatics, and the medical officer of the institution is of opinion that the lunatic has not recovered and is a proper person to be kept in a workhouse as a lunatic, the medical officer shall certify such opinion, and the lunatic may thereupon be received and detained against his will in a workhouse without further order if the medical officer of the workhouse certifies in writing that the accommodation in the workhouse is sufficient for the lunatic's proper care and treatment, separate from the inmates of the workhouse not lunatics, or that the lunatic's condition is such that it is not necessary for the convenience of the lunatic, or of the other inmates, that he should be kept separate.

This institution at Leavesden is admittedly a workhouse within the definition of that word in the Lunacy Act, 1890, s. 341. It is an asylum provided for the reception and relief of the insane under the Metropolitan Poor Act, 1867. It is not a workhouse in the more popular sense of the term, in that it does not contain the normal persons who are to be found in workhouses by reason of misfortune or otherwise, and who have to be maintained in these institutions without any question of their being of defective intelligence. In other words, it is a place confined to the reception of persons who are lunatics or who can lawfully be confined owing to some mental defect. That being so, it would appear that the certificate which the medical officer of the workhouse is required by the section to give is not a thing which in such cases would serve any particularly useful purpose. Nevertheless, in my opinion, in order that a pauper lunatic may be received and detained in a workhouse under that section, it is necessary that all the three matters referred to in the section should come into operation. There must be a discharge from the institution, there must be the opinion of the medical officer of the institution and his certificate, and there must be the certificate of the medical officer of the workhouse. When these three matters are all there, they have the effect of justifying in law the reception and detention in the workhouse, and, moreover, in my judgment, where that machinery is properly carried out, there is no gap or interval of time during which it can be said of the pauper lunatic that he is not being lawfully detained. He goes from the one institution to the other, and his detention in the new institution, and his transfer from the one to the other in pursuance of sect. 25, in my opinion, will all be lawful under the section. If one or other of these three requirements is not satisfied, I cannot myself see how it can be said that the reception into the workhouse, or the detention in the workhouse, is justified. The original reception order, on any view, according to its terms, and apart from special provisions in the Act, only justifies the detention of a lunatic in the specified institution—that is to say, Bexley in the present case. In order that the lunatic's detention in another institution may be justified, some other provision of the Act must be relied upon, and, accordingly, if it is intended to put sect. 25 into operation, and it is not properly put

into operation, the position of the lunatic in the workhouse is that she is being unlawfully detained. She is not being lawfully detained under the original reception order, because that applies only to Bexley. She is not being lawfully detained under sect. 25, because that section has not been complied with.

- A If that construction of the section be right—and, in my opinion, it is right—it is impossible to say of this patient that she was detained in pursuance of an order at any moment of time after she left the Bexley Hospital. We are told that that view was not the view taken, that a different view was taken as to the meaning of sect. 25, and that the
- B result is a misconceived one, but I find myself in complete agreement with that part of the judgment of SIR BOYD MERRIMAN, P., which gives that as the reason for dismissing the petition. The medical officer of the workhouse gave no certificate as required by the section, and the absence of that certificate, in my opinion, makes it impossible to rely
- C on that section as justifying the detention of the patient.

- That is enough really to dispose of this appeal, but SIR BOYD MERRIMAN, P., put as his first reason for dismissing the petition the opinion that, in a case where sect. 25 had been put into operation, even if the necessary certificates both of the medical officer of the original
- D institution and of the medical officer of the workhouse had been given, it would not be possible to say that the detention in the workhouse was pursuant to an order, his view being that the original reception order went, that the detention in the workhouse would be not by virtue of that order, because it had gone, and not by virtue of any other order,
- E because sect. 25 does not provide for an order, and, as the Matrimonial Causes Act, 1937, s. 3 confines the operation of the relevant provision to cases where the person of unsound mind is detained in pursuance of an order, it must follow, according to his view, that, where sect. 25 applies, the Matrimonial Causes Act, 1937, could never operate, because
- F there never can be an order. That, of course, is a far-reaching decision, and would cut down very substantially the operation of the relevant provisions of the Matrimonial Causes Act, 1937. With all respect to SIR BOYD MERRIMAN, P., I do not myself take that view. It seems to me that, where sect. 25 has been put into operation properly, and
- G where the three requirements of sect. 25 have been fulfilled, and a pauper lunatic is removed from the original place and taken—I will not use the word “removed,” for a particular reason—from the original place of detention to the workhouse, the original reception order continues to have effect. I say that because the Lunacy Act, 1890, s. 37 (2),
- H provides that, if a patient is transferred from one place of confinement to another, the original order and certificate or certificates upon which he was received shall remain in force.

I observe that the word used is “transferred,” not “removed.” If it had been “removed,” it would probably have been necessary to confine the operation of the subsection to cases of removal which are

dealt with in a *fasciculus* of sections in the Act, beginning with sect. 58. That *fasciculus* is headed "Removal of lunatics," but the word is "transferred" from one place of detention to another. It seems to me that that word "transferred" is not a technical word having a special meaning in the Lunacy Acts, but is a word of general import which applies, on the true construction of the section, to such a process as is contemplated by sect. 25. That is exactly what happens under sect. 25. The patient is transferred from the original institution to the workhouse, and the justification for the transfer is the putting into effect of the machinery laid down in sect. 25. Therefore, a person to whom sect. 25 has been properly applied would, in my view, after transfer to the workhouse, be detained by force of the original reception order, coupled with the certificates granted under sect. 25.

In the present case, that view does not avail the appellant, because, in order to maintain its validity, the reception order requires the periodical report and certificate of the medical officer to which I have referred earlier in this judgment. No such certificate was given. There, again, we are told that the omission to give that certificate was due to a different view which the authorities have taken in many cases, if not in all, as to the operation of these rather complicated sections.

Giving the matter the best consideration I can, I am of opinion, as I have said, that the original reception order retains its force, and that that order, coupled with the certificates, forms the justification on which the persons in charge of the institution would have to rely if, for instance, a writ of *habeas corpus* were sought against them by a person saying that he was illegally detained.

There is a further argument in favour of that view to which I may refer. I cannot bring myself to believe that, under the Lunacy Acts, a pauper lunatic who happens to have been transferred to a workhouse is given less protection than he had before he was transferred to the workhouse. When this patient was at Bexley, she had the protection of the requirement for periodical reports and certificates. It would be a strange thing if, immediately on transfer to the workhouse, she could be lawfully detained for the rest of her life without the necessity of some such periodical review and report as to her condition. If my view is correct, therefore, the effect would be that that result would not follow, because the obligation to maintain the original reception order in force by the periodical reports and certificates would remain and would continue, and would be carried over from the old régime at Bexley to the new régime of the workhouse. Another view has been canvassed in the course of the argument of the case, and that is that the original order does not remain in force, but that the certificates given under sect. 25 are, by virtue of the definition clause in the Act of 1890, themselves reception orders, or constitute a reception order. The definition of that phrase in sect. 341 of the Act is as follows :

"Reception order" means an order or authority made or given before or after

the commencement of this Act for the reception of a lunatic whether a pauper or not in an institution for lunatics or as a single patient, and includes an urgency order.

A If the view that the certificates by definition are a reception order were correct, it would lead, I think, to the conclusion that they would constitute an order within the meaning of the Matrimonial Causes Act, 1937, s. 3 (a), but it is to be observed that, if that were the true view, the present appellant nevertheless could not succeed, because, though they were reception orders, then as from their date, which was June 19, 1935, the necessity for periodical reports and certificates would exist, and the effect would be that the first report would have to be given, not after 5 years, as would have been the case in the present instance, because that was the appropriate period having regard to the time she had been there, but after 1 year, and would start again with 1 year, 2 years, 3 years, and work up to 5 years. No such reports or certificates were given in this case, so, even if that view be correct, the petitioner must fail, but my reason for preferring the view that the order is to be found under the original reception order lies in the fact that to find the reception order in sect. 25 would mean starting these periods afresh, for which there appears to be no logical reason at all, whereas, if the original reception order is carried over into the new régime, the periodical reports and certificates are also, so to speak, carried over. Accordingly, whatever would be the appropriate interval of time, that seems to me to be a much more logical and sensible construction of the Act, and it fits in with the view which I have formed as to the true meaning of sect. 37 (2).

E I have dealt at some length with that aspect of the case, because I am there differing from one of the reasons of SIR BOYD MERRIMAN, P., and, although I agree with him entirely in the view which he took on the other part of the case, I am unable, with great respect, to accept his reasoning on that point. I prefer the view which I have stated, with the result that the appeal must be dismissed, though, as I have already said, with great regret.

G CLAUSON, L.J. : I concur in all the observations which have fallen from SIR WILFRID GREENE, M.R., in regard to the construction of the Act, and, accordingly, in the conclusion to which he has come, and I will therefore confine myself to saying that I agree that the appeal must be dismissed.

GODDARD, L.J. : I agree.

H *Appeal dismissed with costs.*

Solicitors : *Simmons & Simmons* (for the appellant) ; *Official Solicitor* (for the respondent).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

GRANTHAM v. NEW ZEALAND SHIPPING CO., LTD.

[KING'S BENCH DIVISION (Lewis, J.), **October 31, 1940.**]

Master and Servant—Duty of master—Provision of safe system of working—Unloading ship—Crate of cheese rolling over side of ship through insufficient barrier—Delegation of duty—Common employment.

The plaintiff was engaged in unloading a cargo of cheese from a hold of the defendants' vessel into a barge when a crate of cheese slipped from a sling in which it was being lowered, rolled along the deck and over the side of the vessel, and injured the plaintiff standing in the barge below. The only obstacle to the crate rolling over the side was the top of a curtain plate which projected some 6½ ins. above the level of the deck. The defendants considered this method of unloading to be safe, and, although spars and rope sufficient to form a safe barricade were available, it had never been their practice to use them. A fellow-servant of the plaintiff had been appointed to superintend the unloading, and the defendants contended that, if there was any negligence, which was not admitted, it was the negligence of that fellow-servant in failing to use the ropes and spars. It was found as a fact that the accident was caused through a negligent method of unloading, in that there was an insufficient barricade along the ship's side to prevent cargo from rolling overboard :—

HELD : the negligence which caused the accident was that of the defendants in failing to provide a safe method of working, and they could not, therefore, avail themselves of the plea of common employment.

[EDITORIAL NOTE.] From early times a master has had a duty imposed upon him by common law to see that his servants shall not suffer injury in consequence of his failure properly to superintend and control the undertaking in which he and they are mutually engaged. He must provide a safe method of working, and, once he has done that, he is not responsible for the negligent failure of one of his servants, who has been appointed to superintend the work, to carry out that method. If, however, he has failed to provide a safe method, he cannot avoid responsibility for accidents or the application of the doctrine of common employment by delegating to a servant the task of superintendence.

AS TO LIABILITY OF MASTER IN CASE OF ACCIDENT, see **HALSBURY**, *Hailsham Edn.*, Vol. 22, pp. 187-190, paras. 313-317; and **FOR CASES**, see **DIGEST**, Vol. 34, p. 199, Nos. 1624-1626.]

Case referred to :

- (1) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1938] A.C. 57; [1937] 3 All E.R. 628; Digest Supp.; 106 L.J.P.C. 117; 157 L.T. 406.

ACTION for damages for personal injuries sustained by the plaintiff in the course of his employment by the defendants. The facts and the arguments are fully set out in the judgment.

Blanco White, K.C., and *Moelyn Hughes* for the plaintiff.

St. John Field, K.C., and *Salter Nichols* for the defendants.

LEWIS, J. : In this case, Walter James Grantham, who is now a man of 61 years of age, brings an action against the New Zealand Shipping Co., Ltd., in respect of an accident which happened to him on Aug. 14, 1938. He was working in a barge which was lying alongside the S.S. Remuera, and was stacking in the barge crates of cheese, which were being discharged from No. 4 hold over the ship's side into the

barge. The plaintiff was a stevedore, and was employed by the defendants as one of a gang to unload this vessel. The crates of cheese which were being unloaded were more or less cylindrical objects, weighing, in some cases, as much as 182 lbs. They were 1 ft. 4 ins. in diameter and some 2 ft. 3 ins. in height when they were standing on end. They were shaped like barrels, but they had attached to them, or there was on the outside of them, running from top to bottom when they were standing on end, a certain number of slats or battens, which would prevent their being exactly like a barrel, but would not prevent their retaining their cylindrical shape. The point about the battens is this. It is suggested, and quite rightly suggested, that, if the crates got on their sides, they would not roll as easily as they would if they had no battens whatever running across.

In the afternoon of the day of the accident, a canvas sling which was used to place the crates in the hold was being hauled up with a load of 18 crates, and the plaintiff and the three men who were working with him in the barge were not ready to receive that particular sling of crates at once. The winch driver, as was the practice, having drawn up the sling from the hold, on a signal from the man in charge on deck, allowed it to stop between the hatch and the starboard side of the vessel, and lowered it so that it just touched the deck. That, or some jerk, or something or other, caused one of the crates to fall out of the sling on to the deck. The crate rolled down the deck, over the side, and on to the plaintiff, who was working below. There was no ship's rail in position at that spot. One or more stanchions and the rails had been taken out from the side of the ship in order to facilitate the work of unloading. The result was that, when the crate proceeded to roll towards the side, there was nothing to prevent its going overboard except the top of a curtain plate which projected some 6½ ins. above the level of the wooden deck.

The plaintiff cannot recover against the defendants unless he satisfies me that the accident was caused by the negligence of the defendants. The plaintiff's case is put, as I understand it, in two, or perhaps three, ways. That is to say, there are three allegations of negligence. The first is that the employers provided an improper sling or net—that is to say, improper in the sense that it was a dangerous net. The duty of the employer in this case, as in all others, is to provide proper and reasonably safe machinery for his workmen. It is said that the first thing the defendants failed to do was to provide a proper sling. I have no doubt, on the evidence I have heard, that there is always a risk of cargo, particularly cylindrically-shaped cargo, falling out of a sling, and that is aggravated in a case where the sling is rested on the deck and the strain taken off the ropes which take the strain. I am quite satisfied that even the safest of slings—a sort of flat wooden tray at the bottom, where the cargo, when put into it, is covered with a net—occasionally permits cargo to fall out. That form of sling is known, apparently, as

a scale board. The form of canvas sling used in this case, I am satisfied, was a sling more apt to allow a cylindrical form of cargo to fall out in the circumstances which I have mentioned. Counsel for the plaintiff puts forward as the first allegation of negligence against the defendants that they were not using a proper sling. Even if, as I think was the case, the cargo was more likely to fall out of this form of sling than it was to fall out of a scale board sling, I am unable to find that the use of this form of sling was negligent. It was quite reasonable, in my view, for the defendant shipping company to use this form of sling. I do not say that it is the fact, but, even assuming that the scale board sling is in more common use than this canvas sling, I have been given certain evidence as to this canvas sling being used at certain docks and the other form of sling at other docks. However that may be, I am quite unable to say, on the evidence I have heard, that the defendants were guilty of negligence in using this form of sling. A

The second allegation of negligence is that no steps were taken after the stanchions and rails had been taken out of the starboard side of the vessel for the greater convenience of unloading. In my opinion, this is a perfectly proper thing to do, and, indeed, it can be said that there is evidence that it is a safe thing to do, because, as I understand the suggestion, if one has a ship's rail and one is attempting to lift cargo out of a hold and swing it over the ship's rail, then, if the ship's rail is in its proper place, there is a danger of the load catching it. I suppose that the result of that would probably be that the whole of the contents of the net would be scattered on to the heads of the people working in the barge below. However that may be, I am quite satisfied that it is proper practice to remove the ship's rail and the stanchions. It is said, however, that nothing was put there in its place to prevent cargo from rolling off. It is suggested that the cargo could not and would not roll off. I can only say that, on the evidence I have heard, it is not infrequent for cargo to fall out on to the deck, and, if that cargo is cylindrical in shape, the inevitable result will be that it will start rolling, and there should be something to prevent it from rolling over the ship's side if it falls out of the net. In this case, as I have said, it transpires now—I am quite satisfied about this—that there was a ledge $6\frac{1}{2}$ ins. wide, formed by the top of the curtain plate, which would prevent small objects from rolling over the side, but in this case it was not sufficient to prevent this particular crate from rolling over the side. B C D E F G

The matter in regard to which counsel for the plaintiff has to satisfy me is that it was negligent not to have a larger obstruction to prevent such a thing from happening. It is said, and there is evidence, that, at other docks where cylindrical cargo is being discharged, not necessarily cheeses, something is put up in the way of a preventer rail or spar at a height of some 12 ins. from the loading-deck, and this, if it is properly lashed to the stanchions which remain, will stop any cargo from rolling over. That, I am told by the evidence called on behalf of the plaintiff, H

is the usual practice, and is the proper thing to do. That is the second allegation of negligence which the plaintiff makes against the defendants.

- The third allegation of negligence is really, as I understand it, a combination of the two. What the plaintiff says is this. The practice which included the two matters which I have mentioned—namely, the
- A use of the sling and the absence of precaution to prevent cargo from rolling overboard—is beyond question a bad method of unloading, and, if it is a bad method of unloading—that is to say, a negligent method—the defendants cannot say: “Oh, but if there was negligence in anybody”—if there was, because the case for the defendants is that
- B there was no negligence at all—“you, the plaintiff, cannot recover, because the negligence was the negligence of a fellow-servant of yours.” It is quite clear that the defendants had appointed one Osborne, who gave evidence before me, to superintend the unloading of the cargo. Counsel for the defendants says that an employer is not asked to do
- C more than to take all reasonable steps to appoint a competent person, and there is no suggestion made—and, indeed, there could not be—that Osborne was not a competent person. Counsel for the plaintiff says that this is not a question of causal negligence, if I may use that word, on the part of a servant of the defendants. It is a case of the defendants
- D failing to provide a proper method of working. I am satisfied, as I have said, that it is an improper method of working not to have some sort of rail, or spar, or chain, or rope, across the space where the ship’s rail and stanchions have been taken out, so as to prevent any cargo from slipping or rolling down on the heads of the people below.
- E However, the question which I have to decide, as it seems to me, is whether the failure to have that spar or protection is a question of the negligence of Osborne, or whether it can be said that it is a case of the defendants, the employers, failing to provide a proper method. There was considerable discussion in the course of the argument with regard
- F to that, a discussion which, if I may say so, was extremely helpful. It seems to me, as I have said, that the question which I have to decide is whether the absence of this spar is evidence of a faulty or unsafe method of working for which the defendants are liable. One thing is clear, and that is that in the store—whether the store was on board the
- G ship or on the quay I know not, and it does not matter, as it was conveniently near, at all events, to the place where this unloading was taking place—there were both spars and ropes, and it would not have been difficult for Osborne, if he thought that this was dangerous, which he did not, to have put up a spar, or a rope, or something, to stop these
- H things from sliding overboard. It is said by counsel for the defendants that, as there were spars and ropes available, the defendants had provided proper tackle and a proper and safe method, if it is said to be unsafe to do without the spar, of unloading the vessel. It would appear that that suggestion is slightly inconsistent with the statement made by a witness for the defendants, who said that it was perfectly safe to

unload the ship without any such spar or rope or like preventer. It may strike a casual observer that it is rather curious for a shipping company to say: "We have provided spars and ropes in order to make the method safe. We have done that although we are of opinion that the method without ropes and spars is safe in itself." That is what the two defences of the shipping company are. The first is that there was no negligence at all, and that it was perfectly safe to unload the vessel in the way in which it was being done. As a sort of alternative plea, they say: "If it was not a safe method, we provided safe tackle." One asks oneself why they should have provided safe tackle if they thought, and had always maintained, that the system without a spar or a rope was perfectly safe. A B

I was referred to *Wilsons & Clyde Coal Co., Ltd. v. English* (1), which is the latest authority in the House of Lords on this question of the negligence of an employer who fails to provide a safe system of working. The point, of course, is, as I have said, that, if it is not a failure on the part of the employers, the defendants, to provide a safe system of working, the negligence which caused this accident—and I find it was caused by negligence in the particular which I have mentioned—is the negligence of an employee who failed to take the proper precautions, the means for which had been provided by the defendants, and, therefore, the plaintiff cannot say that the defendants are liable to him, because the negligence was the negligence of a fellow-servant. D

The question I have to decide is whether or not this was a question of failure of the defendants to provide a safe system of working. *Wilsons & Clyde Coal Co., Ltd. v. English* (1) seems to lay down clearly the principles to be applied, and deals explicitly with the provision of a safe system of working. One thing which it seems to enunciate, as I read it, is that it is the duty of an employer to provide a safe system of working. That is the employer's duty, and he cannot delegate it to an employee. If the employer provides a safe system of working, that is one matter, and, if the employee fails to carry it out, then the fault is the fault of the employee, and not that of the employer. In this case, as I have said, although there were spars and ropes available, it was not the practice of the company to use a spar or a rope, and, in my view, it cannot be said that, because they had spars and ropes available for other purposes, and because there was a spar and a rope more or less on the spot which could have been used, that spar or that rope was provided by the defendants for the purpose of unloading this vessel. It was not. The employers thought, and always have thought, and, I fancy, still think, that, in the case of the unloading of these cheeses, it is perfectly safe to carry on in the way in which they did on this particular occasion. They never provided a spar or a rope for the purpose of safely unloading this vessel. It seems to me that it cannot lie in the mouths of the defendants to say: "We think that this method of unloading is perfectly safe, but, if you are going to say that E F G H

it is not safe, why could not the man have gone and fetched a spar or rope and put it across the opening?" That would seem to me to be slightly inconsistent, and I am quite satisfied that the fact is that the defendants never provided any spar or any rope whatever for the purpose of unloading this vessel. When I say unloading this vessel, I mean
A when they were unloading these crates of cheese. It may be, from some evidence which I have heard, that, in the case of large barrels of tallow which are taken out of the hold, the barrel is taken out of the sling and rolled down to the side of the ship and rolled up against either the ship's rail or some other form of bulwark put up to prevent its
B rolling over, and then picked up again by the derrick and slung into the barge or on to the dockside, as the case may be. In those cases, either the ship's rail is left up or some sort of bulwark is put up against which the cask of tallow may be rolled. However, this company have always maintained, and still maintain, that their method is a safe one. As I
C say, it seems to me that it is not open to them to say: "If it is said to be unsafe, there were means by which Osborne could have formed a barricade or bulwark by getting a spar out of the store."

I do not think that I need say any more except that it seems to me that in *Wilsons & Clyde Coal Co., Ltd. v. English* (1) there are passages in
D the opinion of LORD THANKERTON—at p. 70 in particular—which set out the duty of the employer with regard to the system of working and the position of an employer who fails to carry out the safe system of working. A distinction is pointed out there, and also in other cases,
E between the failure of the employer to provide a safe system of working and the failure of an employee to carry out properly that safe system of working, which then amounts to negligent conduct of the employee. The employer having done all he possibly can to carry out his obligations, the accident is caused, in those circumstances, by the negligence of the employee, a fellow-servant. I would also refer to the passages
F already referred to in argument in the opinion of LORD WRIGHT, at pp. 79, 85, and also the very clear exposition of LORD MAUGHAM on this subject, at pp. 86, 87.

It seems to me, therefore, that the position is this. The employers
G failed to supply a safe method of working, and the accident was due to their failure to supply a safe method of working, in that they had nothing substantial, or sufficiently substantial, to prevent anything of the size or shape of these crates from rolling over the side of the vessel, although they knew that cargo frequently did roll out on to the deck from these slings. That being so, the plea of common employment
H does not avail the defendants, and I think that there must be judgment for the plaintiff for damages.

Judgment for the plaintiff for £1,000 and costs.

Solicitors: *Emanuel Garber* (for the plaintiff); *Botterell & Roche* (for the defendants).

[Reported by D. K. BELCHER, Barrister-at-Law.]

POLLOCK v. CHARLES BURT, LTD.

[COURT OF APPEAL (MacKinnon, Luxmoore and du Parcq, L.J.J.).
October 30, 31, 1940.]

Master and Servant—Liability in case of accident—Defences—Common employment—Manager of company riding in company's car—Injury suffered through negligence of driver employed by company—No term in manager's contract of service obliging him to travel by car. A

The plaintiff was injured while travelling in a motor car owned by the defendant company and driven by S. The car was known as the "directors' car," and the department of duty of S. was to drive the car for the defendant company, carrying any director of the company from one point to another in the course of that director's duties. The department of duty of the plaintiff was to act as manager, and on this occasion he was attending to mail orders. There was no term in his contract of service obliging him to travel by this car. He sued the defendants for negligence, and they contended that he was barred by the doctrine of common employment:— B

HELD: the plaintiff and S. were engaged in different departments of duty, and the doctrine of common employment did not, therefore, apply. C

[EDITORIAL NOTE. In *Radcliffe v. Ribble Motor Services, Ltd.* (1) the House of Lords considered the whole basis and development of the doctrine of common employment. The rule is based upon an implied contract by the servant to take upon himself, as between himself and his master, the natural risks and perils incident to the performance of his service. A perusal of the cases on the subject, however, shows that the courts have in many cases tried to determine the limits of the principle as an objective rule of law, without having regard to its foundation in the implied contract of the workman. The House of Lords, while confirming the doctrine by which they were, of course, bound, were able to hold, on the facts of the particular case, that the two employees were not engaged in common work, but in independent tasks, and so were not in common employment. The Court of Appeal, on a consideration of the departments of duties of the respective employees herein, have arrived at a similar conclusion. The present case does not in any way extend or vary the principles already settled with regard to common employment, but merely deals with the application of those principles to a very common practice at the present time and one to which the application of those principles has not been previously considered. D E F

AS TO COMMON EMPLOYMENT, see HALSBURY, *Hailsham Edn.*, Vol. 22, pp. 191-194, paras. 322-328; and FOR CASES, see DIGEST, Vol. 34, pp. 211-217, Nos. 1744-1789.]

Cases referred to:

- (1) *Radcliffe v. Ribble Motor Services, Ltd.*, [1939] A.C. 215; [1939] 1 All E.R. 637; Digest Supp.; 108 L.J.K.B. 320; 160 L.T. 420.
- (2) *Morgan v. Vale of Neath Ry. Co.* (1864), 5 B. & S. 570; *on appeal* (1865), L.R. 1 Q.B. 149; 34 Digest 212, 1750; 35 L.J.Q.B. 23; 13 L.T. 564.
- (3) *The Petrel*, [1893] P. 320; 34 Digest 213, 1757; 62 L.J.P. 92; 70 L.T. 417.
- (4) *Degg v. Midland Ry. Co.* (1857), 1 H. & N. 773; 34 Digest 215, 1782; 26 L.J.Ex. 171; 28 L.T.O.S. 357. H

APPEAL by the plaintiff from a decision of HILBERY, J., dated Sept. 13, 1940. The plaintiff was injured while travelling in a motor car owned by the defendant company and driven by one Spencer. The car was known as the "directors' car," and the department of duty

of Spencer was to drive the car for the defendant company, carrying any servant or director of the company from one point to another in the course of his duties. The plaintiff's department of duty was to act as manager of the company, and on this occasion he was carrying out mail orders. It was no part of his contract of service that he should travel in this particular car. He sued the company for damages for negligence, and the company contended that, since the alleged negligence was that of Spencer, the fellow-servant, the plaintiff was barred by the doctrine of common employment. HILBERY, J., held that the doctrine applied, and gave judgment for the company. The plaintiff appealed.

M. Turner-Samuels and Muir Hunter (for *J. Turner-Samuels* on war service) for the appellant.

G. Russell Vick, K.C., and *R. J. White* for the respondents.

MACKINNON, L.J.: The defence raised by the defendants, Charles Burt, Ltd., is that the plaintiff cannot recover damages against them in respect of the negligence of Spencer, because the plaintiff and Spencer were both their servants, and, therefore, the doctrine of common employment prevents Pollock from recovering for damage caused to him by the negligence of Spencer. As to that, the only question with which we are concerned is whether or not the judge was right in saying that the plaintiff was debarred from recovering under that doctrine of common employment. That doctrine was enunciated by LORD BROUGHAM in 1837 and has been a matter for very considerable criticism, comment and explanation subsequently, and in 1939 the House of Lords dealt with the matter in *Radcliffe v. Ribble Motor Services, Ltd.* (1). It is, of course, not sufficient to debar a plaintiff from recovering against the employers of another man, also in their employment, by whose negligence the plaintiff has suffered, merely to assert that they were both servants of the defendant company or firm in the sense that they were both paid their wages by that firm or company. There are limitations on the doctrine. There are, I think, two which are material. In the latest examination of the question, LORD WRIGHT says, in *Radcliffe v. Ribble Motor Services, Ltd.* (1), at p. 238 ([1939] 1 All E.R., at p. 650):

The relevant limitation, in my opinion, is that the rule does not apply where the injured man and the negligent co-employee are not engaged in the same common work or are not fellow-labourers in the same work or are engaged in different departments of duty.

He perhaps illuminates that pronouncement in a later passage, at p. 249 ([1939] 1 All E.R., at p. 658), where he says that, in order that the doctrine of common employment should apply, the two persons

... must be employed in common work that is, work which necessarily and naturally or in the usual course involves juxtaposition, local or causal, of the fellow-employees and exposure to the risk of the negligence of one affecting the other.

I need not go in detail into the facts of this case, but, in my view, applying that test, Pollock and Spencer in this case were not, when this accident happened, engaged in the same common work, nor were they fellow-labourers in the same work. They were in fact engaged in different departments of duty. Pollock's duty was to act as manager, and, on this occasion, to attend to mail orders. Spencer's duty was to drive the motor car of the defendant company, carrying any servant or director of the defendant company from one point to another in the course of his duties. A

On the facts, as to which there is really no dispute, and accepting the facts as found by the judge, I think the result is that he was wrong in applying the doctrine of common employment so as to debar Pollock from recovering damages sustained by him by reason of the negligence of Spencer, who happened to be another employee of the defendant company and was paid his wages by them. On the question of law, I think that this appeal succeeds and should be allowed with costs. B C

LUXMOORE, L.J. : I agree and do not desire to add anything.

DU PARCQ, L.J. : I agree. I only want to add some words of my own on the question of common employment. It is plain that the mere fact that the driver of this car and the plaintiff were fellow-servants is not enough. As LORD MACMILLAN said in *Radcliffe v. Ribble Motor Services, Ltd.* (1), at p. 235 ([1939] 1 All E.R., at p. 648) : D

The chauffeur who drives his master to the works is not in a common employment with his master's employees in the works, though they have a common employer. E

I have no doubt at all that, subject to any special circumstances which may appear in this case, it could not have been true to say that Spencer, who drove a car usually for the benefit of the directors, and the plaintiff, who had work of a very different kind to perform, were in common employment. In point of fact, it would have been quite possible, and might at one time have appeared probable, for the plaintiff to have gone through the whole course of his employment with the defendants without ever being driven in a car by Spencer or in the car which was referred to sometimes as "the directors' car." F

The first thing which I think one must notice in reading *Radcliffe v. Ribble Motor Services, Ltd.* (1) is that this doctrine of common employment always rests upon an implied contract. LORD WRIGHT truly said, at p. 249 ([1939] 1 All E.R., at p. 658) : G

... it is difficult sometimes to fit a factual qualification on a fictitious contract. H
I appreciate the difficulty of that.

In this particular case, it seems to me abundantly clear, when one looks at the evidence, that it is impossible to imply in this contract of service any term which would relieve the defendants from liability on the facts of this case. It is quite true that, when the plaintiff was

employed, he was told that he might have to do much work outside the usual scope of his employment as a manager, but, when we get a little closer to the facts of this case, I find that the lady who was giving evidence as to the terms of the contract—evidence which was ultimately accepted by the judge—was asked this question: “Was anything said about outside calls, if he had to make any outside calls?”

A The answer she made to that, after considerable delay, because of an objection which was taken to the question, was that the defendants wanted the outside work well looked after. That carried the matter no further, and the further question was asked:

B What about himself going out? Was anything said about what he was to do if he went out?—All managers had instructions that they were not to leave their branches for any length of time without obtaining confirmation from head office.

There was not a word to suggest that it would be likely at any time that he would be sent out in a car by the defendant company. He

C went into their service and did their work. It is quite true that quite properly he was told on occasion to go out on this mail-order business, and that that involved his going in a vehicle, but it involved, in ordinary circumstances, his going with a fellow-employee in a car provided by that fellow-employee himself and driven by him. It is necessary to

D consider whether, if an accident had happened in those circumstances, the doctrine of common employment would have applied. However, I see no reason to think myself that, on the day on which this accident happened, there was anything at all in the contract of employment between the plaintiff and the defendants which obliged him to go in

E the directors' car. I think that he could have said: “I must do this mail-order business, but I will do it in some other way. I will take a cab, if I cannot do it by walking.” I do not think that he could have been ordered to go in this car. If he had been technically minded, he could have said, “It is not part of my contract that I should be driven

F in the directors' car by Spencer,” just as he could have said, if a director had made an offer with regard to a car which was his own private car—one cannot imagine an employee doing it, but it would be open to him to say it—“I never agreed to be driven in your private car.” It would be quite impossible to say, in my opinion, that there was common

G employment between the servant and the driver if the servant did consent to be carried in the directors' car, or in a car which was normally used by the directors.

I do not desire to repeat the references which have been made to *Radcliffe v. Ribble Motor Services, Ltd.* (1). I think that, when one

H looks at the quotation in that case at p. 248 ([1939] 1 All E.R., at p. 657) from the judgment of BLACKBURN, J., in *Morgan v. Vale of Neath Ry. Co.* (2), at p. 580, which I do not propose to read again, great stress is laid by the House of Lords on the word “must” in the phrase “must be included” which occurs in that judgment. When one sees the principle which was applied by SIR FRANCIS JEUNE, P., in

The Petrel (3), and what was said by LORD WRIGHT, it is reasonably plain that this case does not come within the rule so laid down.

I only want to add a word about the other branch of the argument as I understand it. It is said, and HILBERY, J., certainly took the view, that, even if this plaintiff had not been a servant, but had volunteered on that particular day, although not bound to do so, to do this mail-order business, and had been driven in the car, then, on the principle which was laid down, for instance, in *Degg v. Midland Ry. Co.* (4), the defendant would have been absolved from liability. With great respect, it seems to me that neither that case nor any other establishes the proposition which is contended for here by counsel for the defendants. Again, one has to see whether there is any implied term by which the plaintiff is bound to take the risk of negligence of one who had become, for the time being, his fellow-servant. I assume that *Degg's* case (4) was rightly decided. That decided that, when workmen were in difficulties with a turntable, and a volunteer—whether from good or bad motives is not clear from the report—undertook to assist them, that volunteer became for the time being, in a sense, the servant of the employer, and a fellow-worker with the other men, and was taken to have impliedly agreed that he would take the risks of their negligence. However, that is a long way from saying that, when a man, who is not obliged to do the work and is not obliged to go in a car, offers to do it and is given a lift in the car of the person for whose benefit he is doing it, they are then engaged in a common employment. It seems to me that there is all the difference between the case of two men working at a turntable, or two people, as I suggested in the course of the argument, engaged with others at hay-making, where the labour is obviously common labour with a common object, and the case of a man who has a particular piece of work which he wishes to do, and is being driven in a car by somebody who has no concern with that particular work at all, but is concerned only to carry the person doing the work from one point to another for a purpose which need not concern the driver in the least, and with which he need not be acquainted. Looked at from the other point of view, it is even more apparent. Supposing there had been at the works that day some kind person with a car and he had said: "There seems to be some difficulty about this man going out on the mail-order business. I will take him. Tell me where to go, and tell me what to do, and I will gladly do it." It seems to me to be the height of absurdity to suggest that that motorist would become a servant in common employment with the person to whom he was giving a lift, so that, if the man he was helping slammed the door and hurt the motorist's finger, the motorist would be unable to recover—assuming, perhaps wrongly, that it could be said that what the servant did was within the scope of his employment. I am satisfied that we should not be giving effect to the decision of the House of Lords, which is now settled law, and, indeed, the earlier decisions referred to in the opinions

of the House of Lords, if we took any course other than that proposed by MACKINNON, L.J., and I agree in the result.

Appeal on this point allowed with costs.

Solicitors: *Barnett Janner* (for the appellants): *Jacobs & Greenwood* (for the respondents).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

Re SILVESTER, SILVESTER v. PUBLIC TRUSTEE AND OTHERS.

[CHANCERY DIVISION (Farwell, J.), **October 31, 1940.**]

Wills—Family provision—Additional provision for husband—Husband having relinquished employment to attend to home—Husband of advanced years and unlikely to obtain employment—Inheritance (Family Provision) Act, 1938 (c. 45), s. 1.

By her will, dated Oct. 19, 1939, the testatrix left annuities of £104 per annum each to her brother and her sister, and an annuity of £52 to her husband, the plaintiff. The annuities were free of duty, and were liable to be defeated if the annuitants attempted to charge them. She also left a contingent legacy of £500 to her sister, and left the residue of her estate to charities. The plaintiff had married the testatrix in 1913, when he was 42 years of age. His only means were his earnings as a manager of licensed premises, which occupation he gave up on marriage, and devoted himself to looking after his wife, the testatrix, and running the home. The evidence showed that the parties lived together amicably until the death of the testatrix on Feb. 24, 1940. The whole of their living expenses was defrayed by the testatrix. The husband, who was then 68, and entirely dependent on the annuity he received under the will, brought an application for reasonable provision for his maintenance under the Inheritance (Family Provision) Act, 1938 :—

HELD : notwithstanding that it was undesirable that husbands should, as a rule, make applications under the Act for maintenance other than that allowed by the wife's will, the circumstances were such and the estate was sufficient in amount that the husband should be allowed further provision under the will, reasonable provision for his maintenance being an annuity of £156 until remarriage or death on the same terms as the annuities given under the will.

[EDITORIAL NOTE. Applications under the Inheritance (Family Provision) Act, 1938, almost necessarily fall to be decided upon the particular circumstances of each case. The present case must, therefore, be regarded, not as a binding decision of principle, but merely as an indication of a view which the court may take in similar circumstances. As stated in the judgment, an order making additional provision for a husband must in any case be an exceptional one, and it might have been thought that the court would not make such an order. The circumstances in the present case were such that there were ample funds to provide for all the gifts made by the will of the testatrix, and the only result of making additional provision for the husband would be that certain charities would be deprived of that income until the date of his remarriage or death.

AS TO THE INHERITANCE (FAMILY PROVISION) ACT, 1938, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505]

ADJOURNED SUMMONS under the Inheritance (Family Provision) Act, 1938, by a husband for reasonable provision for his maintenance

out of the estate of the testatrix, his wife. The facts are fully set out in the judgment.

A. H. Droop for the plaintiff.

Roger W. Turnbull for the first defendant.

F. Baden Fuller for the second defendants.

FARWELL, J. : This is a summons taken out by Milbourne Silvester, the husband of Caroline Elizabeth Silvester, asking that the court, under the Inheritance (Family Provision) Act, 1938, should make some proper provision for him for his maintenance during his widowerhood on the ground that no such proper maintenance has been provided by the will of his wife.

The material facts are these. The spouses were married on Nov. 5, 1913. At that time, the plaintiff, who was 42 years of age, was the manager of licensed premises. Presumably he was—at that date, at any rate—earning sufficient money to keep himself, but, except for his earnings at that time, he had no money of his own, according to the evidence, and he had no savings or any other money of his own at all. The wife, apparently, had some means. After the marriage of the spouses, the husband gave up his business as manager of the licensed premises, and he and his wife proceeded to live together. They lived together amicably, so far as the evidence shows, until her death on Feb. 24, 1940, a period of some 26 or 27 years. The whole of the spouses' living expenses—their household and living expenses—was defrayed out of the wife's income, the husband having no money of his own. There were no children of the marriage, and, although the wife had been previously married and had had a child, that child had died in infancy, so that there were only the two of them to be kept.

On Oct. 19, 1939, the wife made her will, and by it she appointed executors, of whom the Public Trustee was one, and is the only proving executor. She gave certain legacies, to which I need not refer, and she assigned a sum for the purpose of her sister's burial. Then she gave the whole of her estate to her trustees upon the usual trust to sell and convert, and the whole of the proceeds upon the following trusts :

... to pay the following annuities (all duty free) to my sister . . . Laura Sophia Ellen Barry an annuity of £104 during her life to my brother Ernest Alfred Brigden an annuity of £104 during his life should my said brother die leaving his wife Jessie Brigden him surviving then my executors shall pay his annuity to the said Jessie Brigden during her life to my husband the said Milbourne Silvester an annuity of £52 during his life. I direct my trustees to provide for the said annuities by setting aside such portion of my residuary estate as they shall consider sufficient and that they shall not be at liberty to purchase any annuities. The said annuities shall be paid weekly the first payments to be made within one week of my decease. I declare that no annuitant shall be entitled to receive the capital value of such annuity but only to receive the same as the payments become due and that the same shall only be paid until the respective annuitants in each case shall assign mortgage charge or otherwise encumber the said annuity or attempt to do so and upon any such event happening the said annuity shall cease . . .

Then she directed the trustees in a certain event to provide the sum of £500, and not more than £500, free of legacy duty for her sister, and

then she left her residuary estate to be divided among three charities absolutely.

In those circumstances, the plaintiff brings this summons before the court under the Inheritance (Family Provision) Act, 1938, alleging that the wife has not made proper provision for his maintenance by her will, and asking that the court shall exercise the power, given to it by the Act, of providing some additional annual sum so as to make, together with what the wife has given him, a proper provision for his maintenance. Speaking for myself, I do not think that, in the ordinary way, applications by husbands for the sort of assistance which the Act enables the court to give are applications which ought readily to be entertained. *Prima facie*, the husband, I think, should be able, apart from any children that there may be, to maintain himself, and *prima facie* he ought not to come to the court and ask the court to give him out of his wife's estate more than she has thought fit to provide for him. There are, of course, exceptional cases in which such an application may be well justified, but, personally, I should not be very willing to assist a husband in a case of this sort unless the circumstances were exceptional.

In the present case, however, I think that the circumstances are exceptional. As appears from the evidence, the husband, up to the time of his marriage, was carrying on the business of managing licensed premises, for which, presumably, he was paid, and out of which pay he presumably kept himself. Had he continued in that occupation, it may be that he would have been able by this time to have saved some money in order to make provision for his old age. At any rate, he would not have been out of employment for many years, which necessarily would render it difficult for him to get fresh occupation at this time of his life. He gave up his occupation and his earnings in order to devote himself to his wife. The wife seems to have kept no servants. According to the evidence of the husband, he did all the work of the house and looked after the affairs of the house generally, and, when his wife was ill, which happened on more than one occasion, he had to nurse her and look after her, as she was not willing to have the services of a nurse. Thus, he seems to have had his time fully occupied, during the years of his married life, in running the home and looking after his wife. In that way he was prevented from earning his own living, or from making such provision for his old age as he might otherwise have done. Presumably the husband and wife lived in reasonable comfort. The wife had sufficient income to enable them to have all reasonable comforts. Now the husband suddenly finds himself, at the age of 68, with only £1 per week to live on, and his chances of earning money in the future are very much prejudiced, if not almost prevented, by the circumstances of his married life. In those circumstances, I think that the husband has some reason to feel that his wife has not made a proper provision for him. It is to be noticed

that, in the case of both the sister and the brother of the testatrix, the annuities provided for them are double the annuity provided for the husband, and I think, on the whole, that this is a case in which the court ought to make some reasonable provision for the husband in addition to the small annual sum which is provided by the will itself. Any provision which is made, of course, is only during the husband's widow-
 hood, and can only be paid out of the income of the estate, so that, by providing a small addition to the annual sum to be paid, none of the other annuitants will be prejudiced in any way. The estate is amply sufficient to enable that to be done, and ultimately the charities will get the whole of the estate, although the enjoyment of part of the income, if I make an order, will be postponed during the widowhood of the husband.

As I have said, the husband is given £52 per annum. Allowing for the other two annuities to be provided for, and for the other payments to be made, the evidence shows that there is ample income, calculated in the way the Act directs, to enable that sum of £1 per week to be increased. On the whole, therefore, I have come to the conclusion that the reasonable provision for this man is £4 per week. That will include the £1 per week which he gets under the will. I propose to make an order directing that out of the income there shall be paid to this man during his widowhood an additional £3 per week, subject to the provision against alienation contained in the will in respect of the original £52 per annum, but to be free of legacy duty. Subject to that, the will stands, and any other necessary application will have to be made to the court.

Order accordingly, costs of application as between solicitor and client to come out of the estate.

Solicitors: *Webster, Butcher & Sons* (for the plaintiffs); *Watson, Sons & Room* (for the first defendant); *F. W. Hughes & Son* (for the second defendants).

[Reported by IRENE G. R. MOSES, *Barrister-at-Law*.]

Re LASCELLES, TRUSTEE v. BLACK BROTHERS (FINANCIERS), LTD.

[CHANCERY DIVISION (Farwell and Morton, JJ.), **October 28, 1940.**]

Bankruptcy—Proof of debts—Postponement of debts—Interest—Moneylender's debt—Interest at higher rate than 5 per cent. already received on debt—Bankruptcy Act, 1914 (c. 59), s. 66—Moneylenders Act, 1927 (c. 21), s. 9 (1).

The respondents, B.B., Ltd., advanced to the debtor, J. E. C. L., the sum of £2,000, in respect of which she gave them a promissory note on Sept. 20, 1938, in the following terms: "I, the undersigned, promise to pay . . . the sum of £2,000 together with interest thereon at the rate of 45 per cent. per annum by consecutive quarterly instalments of

£400 each and balance on Oct. 1, 1939, until the whole sum of principal and interest is paid, the first of such instalments to be due and payable on Jan. 10, 1939. In case of default in payment of any instalment or part thereof, I, the undersigned, promise to pay on demand the whole of the balance of the said principal sum of £2,000 then outstanding, and due interest at the rate aforesaid to the date of such demand, together with simple interest on such balance of principal and interest at the rate of 45 per cent. per annum from the date of such demand until payment and until such demand to continue to pay the said quarterly instalments together with simple interest at the above rate on the amount of any of the said instalments from due date until payment and all moneys paid on account of the said advance and interest shall be applied, first, in payment of the interest due and then to principal." On the same date, she gave them a charge on her interest in the trusts executed in her favour by her late husband as a collateral security. The first instalment of £400 was due on Jan. 10, 1939, but was not paid until Feb., 1939, and was apportioned as to £340 8s. 6d. to principal and £59 11s. 6d. to interest. A receiving order was made against J. E. C. L. on Apr. 26, 1939, and on May 10, 1939, she died. On June 7, 1939, an order was made for the administration of her estate in bankruptcy. The security was agreed at £500, and appropriated as to £394 1s. 10d. to principal and £105 18s. 2d. to interest. Therefore, there was due at the date of the receiving order £1,265 9s. 8d. and £340 3s. in respect of principal and interest respectively. The trustee admitted proof against the estate as at £1,605 12s. 8d., but marked it for the purpose of dividend at £1,265 9s. 8d. in respect of the principal due at the date of the receiving order and postponed in respect of interest pursuant to the Bankruptcy Act, 1914, s. 66. His reason for postponing the interest was that, as the creditors had already received interest at a higher rate than 5 per cent. per annum, they could not rank for dividend for any further interest until all other debts had been paid in full. The creditors appealed to the county court from the trustee's decision, and the judge made an order allowing the creditors to rank for dividend "for the balance of principal—namely, the sum of £1,265 9s. 8d.—and, in addition, interest on such unpaid balance to date of receiving order at 5 per cent. per annum—namely, one-ninth of £340 3s., calculated at 45 per cent. per annum." The trustee appealed from this decision:—

HELD: upon the proper construction of the Bankruptcy Act, 1914, s. 66, and of the Moneylenders Act, 1927, s. 9, the decision of the trustee was right, and the creditors could not rank for dividend for any further interest.

[EDITORIAL NOTE. Where a debt proved includes interest, interest beyond 5 per cent. is postponed for the purpose of dividends, though not for the purpose of proof. In the case of moneylenders' debts, this provision is varied by the Moneylenders Act, 1927, s. 9, the effect of which is here considered. The matter is one of some difficulty, and it is decided that, for the purpose of dividends, the moneylender is not entitled to receive any interest until all the unpostponed creditors have been paid in full.

AS TO PROOF FOR INTEREST, see HALSBURY, Hailsham Edn., Vol. 2, pp. 309, 310, para. 412; and FOR CASES, see DIGEST, Vol. 4, pp. 305-307, Nos. 2852-2875.]

APPEAL by the trustee from a decision of His Honour JUDGE HURST, dated July 2, 1940, at Coventry County Court reversing the decision of the trustee, and admitting the respondents, Black Brothers (Financiers), Ltd., to rank for proof at £1,605 12s. 8d. and marking it as allowed for the purpose of dividend as £1,265 9s. 8d. in respect of principal, and, in addition, interest on the unpaid balance to the date of the receiving

order at 5 per cent. per annum—namely, one-ninth of £340 3s., calculated at 45 per cent. per annum.

R. F. Levy, K.C., and *G. F. Kingham* for the appellant.

V. R. Aronson for the respondents.

MORTON, J. [delivering the judgment of the court]: On Sept. 20, A
1938, the bankrupt, Mrs. Lascelles, now deceased, gave a promissory
note to Black Brothers (Financiers), Ltd., in the following terms:

I, the undersigned, promise to pay Black Brothers (Financiers), Ltd., or order
at 42, Pilgrim's Street, Newcastle-on-Tyne, the sum of £2,000 together with interest
thereon at the rate of 45 per cent. per annum by consecutive quarterly instalments
of £400 each and balance on Oct. 1, 1939, until the whole sum of principal and B
interest is paid, the first of such instalments to be due and payable on Jan. 10,
1939. In case of default in payment of any instalment or part thereof, I, the
undersigned, promise to pay on demand the whole of the balance of the said principal
sum of £2,000 then outstanding, and due interest at the rate aforesaid to date of
such demand, together with simple interest on such balance of principal and interest
at the rate of 45 per cent. per annum from the date of such demand until payment C
and until such demand to continue to pay the said quarterly instalments together
with simple interest at the above rate on the amount of any of the said instalments
from due date until payment and all moneys paid on account of the said advance
and interest shall be applied, first, in payment of the interest due and then to
principal.

On the same date, she gave to Black Brothers (Financiers), Ltd., who
are registered moneylenders, a memorandum in the following terms: D

In consideration of your this day advancing me the sum of £2,000 on my promis-
sory note dated Sept. 20, 1938, and in order to better secure yourselves, I hereby
charge to you by way of collateral security all my interest in the trusts executed
in my favour by my late husband the Hon. E. Lascelles.

Those documents having been given, and the sum of £2,000 having been E
advanced to the bankrupt, the first instalment of £400 was paid, not on
Jan. 10, 1939, when it became due, but on Feb. 9, 1939. On Apr. 26,
1939, before any further payment had been made, a receiving order was
made against the debtor. On May 10, 1939, the debtor died, and on
June 7, 1939, an order was made for the administration of her estate in F
bankruptcy.

Questions arose as to the validity and effect of the document pur-
porting to give a charge to the creditors, and ultimately it was com-
promised between the trustee in bankruptcy and the creditors on the
footing that the charge was to be regarded as a valid charge for £500. G
I do not think that it is disputed between counsel appearing on this
appeal that that £500 should be treated as a payment of £500 on account
of the debt made as at the date of the receiving order. The creditors
lodged a proof on Apr. 19, 1940, and that proof is in the twofold form
which is usual, having regard to the Bankruptcy Act, 1914, s. 66, and H
the Moneylenders Act, 1927, s. 9. The Bankruptcy Act, 1914, s. 66 (1),
provides as follows:

Where a debt has been proved, and the debt includes interest, or any pecuniary
consideration in lieu of interest, such interest or consideration shall, for the pur-
poses of dividend, be calculated at a rate not exceeding 5 per centum per annum,
without prejudice to the right of a creditor to receive out of the estate any higher

rate of interest to which he may be entitled after all the debts proved in the estate have been paid in full.

It follows, therefore, that the debt may be proved for an amount larger than that which is admitted for dividend in the first instance. That subsection was slightly modified in the case of a moneylender by the Moneylenders Act, 1927, s. 9 (1), which provides as follows :

Where a debt due to a moneylender in respect of a loan made by him after the commencement of this Act includes interest, that interest shall, for the purposes of the provisions of the Bankruptcy Act, 1914, relating to the presentation of a bankruptcy petition, voting at meetings, compositions and schemes of arrangement, and dividend, be calculated at a rate not exceeding 5 per cent. per annum, and nothing in the foregoing provision shall prejudice the right of the creditor to receive out of the estate, after all the debts proved in the estate have been paid in full, any higher rate of interest to which he may be entitled. The provisions of this subsection shall, in relation to such a debt as aforesaid, have effect in substitution for the provisions of the Bankruptcy Act, 1914, s. 66 (1).

The result of that subsection is to apply in the case of a moneylender, so far as regards the question of dividend, the same provisions as appear in the Bankruptcy Act, 1914, s. 66 (1), but also to apply those provisions to certain other matters, such as the presentation of a bankruptcy petition and voting at meetings, and so on. So far as material for the present case, s. 66 (2) provides as follows :

In dealing with the proof of the debt, the following rules shall be observed . . .
(b) Any payments, made by the debtor to the creditor before the receiving order, whether by way of bonus or otherwise, and any sums received by the creditor before the receiving order from the realisation of any security for the debt, shall, notwithstanding any agreement to the contrary, be appropriated to principal and interest in the proportion that the principal bears to the sum payable as interest at the agreed rate ; (c) Where the debt due is secured and the security is realised after the receiving order, or the value thereof is assessed in the proof, the amount realised or assessed shall be appropriated to the satisfaction of principal and interest in the proportion that the principal bears to the sum payable as interest at the agreed rate.

There is nothing in the Moneylenders Act, 1927, which appears to modify or alter the provisions of that subsection. The Moneylenders Act, 1927, s. 9 (2), deals with procedural matters, and deals with the supplying of information of certain particulars to the trustee when any proof is submitted by a moneylender.

On Apr. 19, 1940, the creditors put in the proof to which I must now refer. It starts on Sept. 20, 1938, with the words : "To amount of loan, principal £2,000." Then it includes interest from Sept. 20, 1938, to Feb. 9, 1939, at 45 per cent. per annum, which is £350 2s. 9d. It then treats the payment of £400 made on Feb. 9, 1939, as being appropriated to principal and interest in the proportions of £340 8s. 6d. to principal and £59 11s. 6d. to interest. No question arises as to the correctness of that arithmetical calculation, and the payment of £400 was so treated pursuant to the terms of the Bankruptcy Act, 1914, s. 66 (2) (b). The total amount of principal then became £1,659 11s. 6d. and the amount due for interest £290 11s. 3d. In the proof, there is then put down interest from Feb. 9, 1939, to Apr. 26, 1939, the date of the receiving order, at 45 per cent. on the balance of the principal, which is £155 9s. 11d

That, added to the sum of £290 11s. 3*d.*, makes the interest £446 1s. 2*d.*, the principal still due remaining at £1,659 11s. 6*d.* Then the next item is :

Less agreed value of security, £500, apportioned as to £394 1s. 10*d.* to principal and £105 18s. 2*d.* to interest.

That purports to have been done under the provisions of the Bankruptcy Act, 1914, s. 66 (2) (c), and it is not suggested that that appropriation is incorrect. The result was to bring out the balance of principal due at the date of the receiving order at £1,265 9s. 8*d.* and the amount of interest at £340 3s., making together a total of £1,605 12s. 8*d.* I need not refer to the subsequent part of the proof, because it is not contended by counsel for the appellant in this case that the latter part of this proof does not set out the matter in the correct form. The way in which the trustee in bankruptcy dealt with this proof was as follows. He admitted the proof against the estate for the sum of £1,605 12s. 8*d.*, but he marked it as having been allowed for the purpose of dividend at £1,265 9s. 8*d.*, that being the amount stated in the proof to be due in respect of principal at the date of the receiving order, and postponed, in respect of the sum of £340 3s. for interest, pursuant to the Bankruptcy Act, 1914, s. 66, and the notice continues as follows :

... without prejudice to your right to receive out of the estate such postponed interest after all debts proved on the estate have been paid in full.

We understand that the footing upon which the trustee took that view was this. He said in effect : "The creditors have received on account of interest two sums—namely, £59 11s. 6*d.* and £105 18s. 2*d.* These two sums, taken together, amount to interest on the debt at a higher rate than 5 per cent. That being so, the creditors cannot rank for dividend for anything at all in respect of interest." He allowed them, however, to rank for dividend in respect of capital for the full sum of £1,265 9s. 8*d.* The creditors appealed from that decision to the county court, and the county court judge made an order as follows :

This court doth order that the proof be admitted to rank for the sum of £1,605 12s. 8*d.* but for the purpose of dividend only for the balance of principal—namely, the sum of £1,265 9s. 8*d.*—and, in addition, interest on such unpaid balance to date of receiving order at 5 per cent. per annum—namely, one-ninth of £340 3s., calculated at 45 per cent. per annum shown on the said proof.

We find it a little difficult to understand the concluding words, beginning with the words "namely, one-ninth of £340 3s.," but, whatever may be the precise meaning of that part of the order, it is plain that the county court judge allowed the creditors to rank for dividend for £1,265 9s. 8*d.* and interest to the date of the receiving order—we think it must be from the date when the £2,000 was advanced—at 5 per cent. per annum.

The debt in question in this case comes within the words of the Moneylenders Act, 1927, s. 9. It is a debt due to a moneylender in respect of a loan made by him after the commencement of the Act,

- and it includes interest. When the whole transaction is considered, it appears that the moneylender has in fact received interest on the sum owed to him by the debtor at a rate exceeding 5 per cent. It seems to us that it cannot be the true construction of the section that, having received interest at a rate exceeding 5 per cent., the creditor should be
- A entitled to receive a dividend in the first instance for any further sum of interest. We think that the true view is this. Considering the debt which was the amount of the original advance—namely, £2,000—and taking into account the subsequent payments which have been properly treated as in part payment on account of principal and in part payment
- B on account of interest, we think that it will be found that the moneylenders have received more than 5 per cent. on the money which passed from them to the debtor. In those circumstances, we do not see how any further sum by way of interest can be allowed to rank for dividend. We think that the trustee in bankruptcy has treated the matter properly.
- C He allowed the whole of the £1,265 9s. 8d. to rank for dividend in respect of principal, and we think that that was right. The two sums to be taken into account were properly apportioned under the Act, and we see no reason why the amount for which the creditors could rank in respect of principal should have been reduced. On the other hand, so
- D far as regards the claim for interest, since the creditors have already received more than 5 per cent. interest, there is no further sum for which they can claim a dividend in respect of interest unless and until all the creditors in the bankruptcy have been paid in full. For these reasons, we think that the appeal must be allowed.
- E I may add this. It would seem a very strange result if the true construction of the Moneylenders Act, 1927, s. 9, were that which is apparently taken by the county court judge. The figure of £1,265 9s. 8d. was a figure which was only ascertained as being the balance due for principal at the date of the receiving order, and it would seem strange
- F if that figure should be taken and 5 per cent. interest on that figure should be calculated right back to the time when the original £2,000 was advanced by the creditor to the debtor.

Appeal allowed with costs in both courts. Leave to appeal to the Court of Appeal.

- G Solicitors: Woolfe & Woolfe (for the appellant); Alec Woolf & Turk (for the respondent).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

ASSOCIATED BRITISH ENGINEERING, LTD. v. INLAND REVENUE COMMISSIONERS.

[KING'S BENCH DIVISION (Lawrence, J.), **October 7, 1940.**]

Revenue—Stamp duty—Voluntary disposition inter vivos—Transfer of shares—Transfer in pursuance of resolution declaring capital bonus partly in specie and partly in cash—Whether transfer itself passes any beneficial interest—Finance (1909-10) Act, 1910 (c. 8), s. 74 (6). A

The appellant company passed a resolution at its annual general meeting that a portion of its capital reserves, being surplus proceeds of the sale of certain of its property, should be distributed by way of capital bonus to the ordinary shareholders, partly *in specie* and partly in cash, and that, accordingly, there should be distributed to each ordinary shareholder in respect of each ordinary share registered in his name one fully-paid 5s. ordinary share in H. & F., Ltd., one fully-paid 5s. ordinary stock unit in the B. E. E. Co., Ltd., and 7s. 6d. in cash. Transfers were made by the company in pursuance of this resolution, and the company contended that the transfers did not operate as voluntary dispositions *inter vivos*, since the beneficial interest in the property had passed by virtue of the resolution, and no beneficial interest was, therefore, conveyed or transferred by the several transfers. The company also contended that, as it was acting in pursuance of the resolution, and was bound to do so, it was not acting voluntarily. For the Inland Revenue, it was contended that the transaction must be regarded as a whole, and that it was impossible to dissociate the transfers from the resolution :— B C

HELD : the transactions must be regarded as a whole and the transfers must be stamped as voluntary conveyances. D

[EDITORIAL NOTE.] It is well-settled that the transfer of property from a bare trustee to a beneficiary does not attract voluntary disposition duty, and the argument here is, in effect, that the resolution put the company into the position of a bare trustee. This argument is rejected on the ground that the resolution did not create any trust and **that**, therefore, the company could not be a trustee. E

AS TO VOLUNTARY DISPOSITION DUTY, see HALSBURY, Hailsham Edn., Vol. 28, pp. 475-477, paras. 1004-1007; and FOR CASES, see DIGEST, Vol. 39, pp. 284, 285, Nos. 667-671.]

CASE STATED by the Commissioners of Inland Revenue pursuant to the Stamp Act, 1891, s. 13. The appellant company was incorporated with a capital of £150,000, which was subsequently increased to £500,000 divided into 250,000 preference shares and 152,500 ordinary shares. Under cl. 3 (g) of its memorandum of association, the appellant company had power F

... to distribute among the members *in specie* any property of the company or any proceeds of sale or disposal of any property of the company, but so that no distribution amounting to a reduction of capital be made, except with the sanction, if any, for the time being required by law. G

The balance sheet of Mar. 31, 1939, of the appellant company showed that the company was possessed of capital and revenue reserves aggregating £304,557 13s. 1d.—that is, approximately £2 per ordinary share. In the report of the company for the year ended Mar. 31, 1939, the directors recommended that, in accordance with cl. 3 (g) of the memorandum of association, a portion of the capital reserves, being surplus proceeds of sale of certain of the company's property, should H

- be distributed by way of capital bonus to the ordinary shareholders, partly *in specie* and partly in cash, and they recommended further that a distribution equivalent in value to approximately £1 per share should be made to each ordinary shareholder in respect of each ordinary share registered in his name on Nov. 15, 1939, such distribution to be
- A made as follows : (a) 1 fully-paid 5s. ordinary share in Heenan & Froude, Ltd. ; (b) 1 fully-paid 5s. ordinary stock unit of the Brush Electrical Engineering Co., Ltd. ; and (c) the sum of 7s. 6d. in cash. It was also proposed that each holder of 20 shares or less should receive, in lieu of the above distribution, the sum of £1 entirely in cash in respect of each
- B ordinary share so registered in his name. At the annual general meeting of the company, held on Nov. 15, 1939, a resolution was passed in the terms of these recommendations. Subsequently, in pursuance of the resolution, the appellant company made transfers of certain ordinary stock units of the Brush Electrical Engineering Co., Ltd., and of ordinary
- C shares of Heenan & Froude, Ltd. The commissioners were of opinion that each of the transfers was " a conveyance or transfer operating as a voluntary disposition *inter vivos* " liable to *ad valorem* duty under the provisions of the Finance (1909-10) Act, 1910, s. 74, by reference to the value of the shares transferred in each case. They accordingly
- D assessed the transfers with *ad valorem* duty under the relevant statutory provisions. The company contended that each of the transfers was liable, not to *ad valorem* " voluntary disposition " duty, but to the fixed duty of 10s. under the head of charge " conveyance or transfer of any kind not hereinbefore described " in the Stamp Act, 1891,
- E Sched. I.

E. M. Winterbotham (for *Herbert Hart* on war service) for the appellants.

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *J. H. Stamp* for the respondents.

- F **LAWRENCE, J. :** The question in this appeal is whether certain transfers of shares from the appellant company to its shareholders in other companies, made in pursuance of a resolution declaring a capital bonus of the appellant company partly *in specie* and partly in cash, are stampable under the Finance (1909-10) Act, 1910, s. 74, as being
- G conveyances or transfers operating as voluntary dispositions *inter vivos*. The appellant company passed a resolution authorising the distribution of fully-paid shares in another company, stock units in the Brush Electrical Engineering Co., Ltd., and some cash. In pursuance of the recommendation of the directors, a resolution authorising this distri-
- H bution of the capital bonus was passed on Nov. 15, 1939, and the transfers in question were made in pursuance of that resolution.

On behalf of the appellants, it is argued that these transfers did not operate as voluntary dispositions *inter vivos*, and the main dispute between the appellants and the Crown is as to whether it is right to look at the whole transaction—namely, the transfers and the antecedent

resolution declaring the capital bonus—or whether it is right to look solely at the transfers themselves. It is argued that, on the passing of the resolution, an equitable right to the shares to which the resolution referred was created in the shareholders of the appellant company, that, therefore, the transfers themselves did nothing more than give effect to the pre-existing right of the shareholders and did not pass any beneficial interest to the shareholders themselves, and that, apart from that consideration, which has reference to the Finance (1909-10) Act, 1910, s. 74 (6), in any event it could not be said that the transfers were voluntary, because they were made in pursuance of the obligation which the company had already undertaken.

The Solicitor-General, on the other hand, argues that the transaction must be looked at in reality and as a whole, that, if one looks at it in that way, it is impossible to dissociate the transfers from the resolution declaring the capital bonus, and that, if it is looked at in that way, the transaction is truly described as a voluntary disposition *inter vivos*, because it was a disposition by the company which the company chose to make. To that argument counsel for the appellants contended in reply that, if it were right to go back in that way to the resolution of the company, still it could not be said that it was a voluntary disposition, because it was a disposition made by the company in pursuance of the legally expressed will of the corporators or shareholders in the company.

The question turns upon the meaning of the words “voluntary disposition *inter vivos*” in sect. 74 (1), and particularly upon the meaning of the words in sect. 74 (6):

A conveyance . . . under which no beneficial interest passes in the property conveyed or transferred . . .

That subsection provides that such a conveyance shall not be charged with duty under the section, and, as I have already said, the appellants' argument is that no beneficial interest passed in the property conveyed or transferred in this case, because, so it is contended, the beneficial interest had already passed by virtue of the resolution of the company.

I am unable to accept the arguments which were put forward on behalf of the appellants. In my opinion, the transactions ought to be regarded as a whole, and, if that is the true view, it appears to me that the disposition was a voluntary disposition of its reserves by the company, and I do not think that it can successfully be argued that the company was not acting voluntarily because it was acting in pursuance of the wishes of the majority of the corporators legally expressed. Nor do I think that it can truly be said that no beneficial interest passed in the property conveyed by virtue of those transactions. As I understand the facts, the company held more shares in these companies than those of which it actually disposed to its shareholders, and, although the resolution no doubt gave the shareholders in the appellant company a right of action in respect of the declaration of this capital bonus, it did not create any trust, and, in my opinion, on the execution of these

transfers a beneficial interest in the property conveyed to the shareholders did pass. For both these reasons, therefore, I am of the opinion that the decision of the commissioners was right, and that this appeal must be dismissed with costs.

Appeal dismissed with costs.

A Solicitors: *Pennington & Son* (for the appellants); *Solicitor of Inland Revenue* (for the respondents).

[Reported by D. K. BELCHER, Barrister-at-Law.]

B MOSCROP v. LONDON PASSENGER TRANSPORT BOARD.

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.JJ.), July 31, August 1, 2, November 4, 1940.]

C *Trade Unions—Imposing conditions on employees—Employees of public authority accorded right of representation by union officials—Right of employees to be represented by official of other union—Condition of employment with regard to membership of union—Trade Disputes and Trade Unions Act, 1927 (c. 22), s. 6.*

D The defendants had by cl. 3 of the schedule of the contract of employment given their employees the right to be accompanied by a representative of trade union A at the hearing of appeals in respect of disciplinary action against such employees. The plaintiff, an employee of the defendants, was a member of trade union B, and he claimed a declaration that "the condition of his employment whereby he was denied . . . the advantage of representation by an official of his own trade union [trade union B] was unlawful." On his behalf, it was contended that the denial by the defendants of the right of their employees to be represented by officials of a union other than union A was a "condition" within the Trade Disputes and Trade Unions Act, 1927, s. 6 (1), and, as such, was void by virtue of sect. 6 (3) of that Act. On behalf of the defendants, it was contended, not only that they had not imposed any condition upon the plaintiff, but also that, on the contrary, the plaintiff was attempting to impose a condition upon them, the defendants, in seeking to compel them to admit representatives of trade union B to the hearing of disciplinary appeals:—

F HELD: cl. 3 of the schedule of the contract of employment constituted a condition of the employment, and was void by reason of the Trade Disputes and Trade Unions Act, 1927, s. 6.

Decision of MORTON, J. ([1940] 3 All E.R. 225) reversed.

G [EDITORIAL NOTE. The Trade Disputes and Trade Unions Act, 1927, s. 6, makes it unlawful for a public authority to impose upon employees any condition whereby employees who are not members of a trade union are liable to be placed under any disadvantage as compared with other employees. The court here considers the meaning of the words "impose any condition," and finds that, upon a fair construction of those words, the employers, by giving a right of representation by a particular advocate, imposed a condition that the employee could not be represented by anyone else.

H FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 32, p. 490, para. 782; and FOR CASES, see DIGEST, Supp., Trade and Trade Unions, No. 1047.]

Cases referred to:

- (1) *R. v. Buchanan* (1846), 8 Q.B. 883; 42 Digest 750, 1738; 15 L.J.Q.B. 227; 7 L.T.O.S. 83.

- (2) *Osborne v. Milman* (1887), 18 Q.B.D. 471; 42 Digest 414, 4766; 56 L.J.Q.B. 263; 56 L.T. 808.
- (3) *R. v. Hall*, [1891] 1 Q.B. 747; 42 Digest 731, 1531; 60 L.J.M.C. 124; 64 L.T. 394.
- (4) *A.-G. v. Birkenhead Corpn.* (1928), 93 J.P. 33; Digest Supp.

APPEAL by the plaintiff from an order of MORTON, J., dated May 27, 1940, and reported [1940] 3 All E.R. 225. The facts are fully set out in the judgments. A

W. P. Spens, K.C., and *R. Moelwyn Hughes* for the appellant.

H. U. Willink, K.C., and *H. E. Salt* for the respondents.

Spens, K.C.: Employees who are members of the Transport and General Workers' Union are entitled to be represented by a trade union official on an appeal to the board. Those employees who belong to another union have no such right. Therefore, some of the employees of the London Passenger Transport Board are at a disadvantage as compared with others. The right of representation is a valuable one. C
In *A.-G. v. Birkenhead Corpn.* (4), MAUGHAM, J., took the view that an offence against the opening words of sect. 6 of the 1927 Act was committed if men were required to be members of a particular union just as much as if they were required to be members either of any union at all or of no union. This is not an appeal by a man who is a non-unionist D
The appellant is a member of a trade union. The respondent board however, gives members of one trade union an advantage over members of another trade union. The moment a refusal to allow an official to be present at the hearing of the appellant's appeal was made by the disciplinary board, a condition was imposed. In the present case, the E
appellant has been placed at a disadvantage as compared with his fellow-employees. It is a disadvantage for a union man not to be represented by an official of his union. The disadvantage comes directly within the words of the subsection. No condition must be imposed. F
The employer may not make membership of a particular trade union so attractive that a man is induced even indirectly to become a member of that union. The appellant is prejudiced by the present condition.

Willink, K.C.: The privilege which the board gives is more valuable to some than it is to others. However, that does not mean that the plaintiff can succeed. There was no doubt in the court below that G
this action was brought in order to obtain for the members of the National Passenger Workers' Union the same advantages as regards representation as those enjoyed by the members of the Transport and General Workers' Union, and there is no doubt that the new union H
launched this action to get what it conceived to be equality between its members and those of the older union. The effect and scope of sect. 6 are quite simple, and the matter was readily solved by MORTON, J. What the respondent board has done is to grant to its employees the liberty of being represented before the disciplinary board by an official of a particular union. The giving of a liberty is not the same thing as

- the imposing of a condition. The giving of a liberty to all, so that some may make use of that liberty while others may not, is not an imposing of a condition. The conditions which sect. 6 avoids are conditions in the contract of employment. No terms are of any relevance, so far as sect. 6 is concerned, unless they impose a condition. The object of
- A the section is to protect both unionists and non-unionists from pressure by local authorities. It is difficult to contemplate the avoidance of a condition, other than a contractual condition. It is void in any event if it is a threat. The purpose of the section is to avoid certain conditions in contracts and not to create contracts out of nothing. In the
- B appellant's contract with the respondent board, there was no negative stipulation, express or implied. The relationship of master and servant, without any stipulation, does not give the right of representation, and, therefore, there is no need to imply a negative stipulation into the contract. Therefore, it is not right to describe the contract as one
- C which impliedly negatives the right of representation. The doctrine of implied terms in contract is resorted to, not in order to bring into a contract something which is there apart from agreement, but in order to insert into the contract something which the parties obviously intended should be there. The absence of a right which could exist
- D only by reason of a special agreement is not a matter aimed at by sect. 6.

- SCOTT, L.J.: In this appeal, the appellant, to whom I shall refer as the plaintiff, is, and was at all material times, an omnibus driver in
- E the employment of the respondent board. He claims a declaration that the board has been guilty of a breach of statutory duty under the Trade Disputes and Trade Unions Act, 1927, s. 6, and asks for an injunction or liberty to apply. The facts are fully set out in the judgment of
- MORTON, J., and I summarise them only in order to bring out the legal
- F issues.

- From 1928 till 1932, the plaintiff was a driver in the service of the London General Omnibus Co. In 1932 the board was created by Act of Parliament and took over the London omnibus system, and the plaintiff passed into its service. In 1937, there was a strike of the
- G board's drivers, including the plaintiff, which was settled on new terms of employment negotiated with the board by the Transport and General Workers' Union, to which the board's "platform staff" (which included its drivers and conductors, and, at that time, the plaintiff) belonged. The terms are contained in the schedule to the memorandum of agree-
- H ment, dated June 15, 1937, referred to in the appeal as the "brown book." At that date, there was no other trade union to which the board's platform staff belonged, but in Feb., 1938, the plaintiff and others who had become dissatisfied with the Transport and General Workers' Union formed and joined a new union, called the National Passenger Workers' Union. The plaintiff was still an effective member

of the National Passenger Workers' Union at the time of the events which gave rise to the present proceedings, but he had ceased to be in benefit in the Transport and General Workers' Union.

In Feb., 1939, the plaintiff was reported by an inspector of the board for failing to pick up a would-be passenger. He appeared before the deputy superintendent and submitted that he had been in the right, A but failed in his defence and was "cautioned." He then appealed, first to the divisional superintendent, who affirmed the deputy, and then to the disciplinary board. On Apr. 18, 1939, he appeared before that board, accompanied, for the purpose of representation on his appeal, by the general secretary of his own union, but was told by persons acting B with the authority of the board that he could not be represented by anyone but the secretary of the Transport and General Workers' Union. Clause 3 of the schedule to the terms of employment in the brown book was as follows :

Drivers and conductors appearing before a divisional superintendent or on appeal C may be accompanied by an official of the union.

By definition, the union meant the Transport and General Workers' Union. That sentence plainly imported the negative—namely, that an appellant had no right to be represented by anyone else. It was on this provision that the board's refusal to allow an official of his own union D to represent him was based. The judge found as a fact, and I agree with his finding, that no official of the Transport and General Workers' Union would have represented the plaintiff, because he was not a member of that body, and added that, if the plaintiff had appeared accompanied by an official of that union, the disciplinary board would have E raised no objection. The evidence which was read to us, particularly that of the plaintiff and that of the general manager of the operation side of the board, satisfies me that the second finding is otiose. There was in truth no possibility of the plaintiff being represented by anyone F from the Transport and General Workers' Union. The plaintiff had to choose between conducting his own appeal without the aid of any representation and withdrawing his appeal. He chose the latter course.

The Trade Disputes and Trade Unions Act, 1927, s. 6, provides as follows :

(1) It shall not be lawful for any local or other public authority to make it a G condition of the employment or continuance in employment of any person that he shall or shall not be a member of a trade union, or to impose any condition upon persons employed by the authority whereby employees who are or who are not members of a trade union are liable to be placed in any respect either directly or indirectly under any disability or disadvantage as compared with other employees. (2) It shall not be lawful for any local or other public authority to H make it a condition of any contract made or proposed to be made with the authority, or of the consideration or acceptance of any tender in connection with such a contract, that any person to be employed by any party to the contract shall or shall not be a member of a trade union. (3) Any condition imposed in contravention of this section shall be void.

It was rightly conceded, both below and before us, that the board was a "public authority" within subsect. (1).

On the above facts, I am of opinion that in two respects the board has committed breaches of the duty towards the appellant imposed on it by subsect. (1). In 1932, when the board took over from the London General Omnibus Co., the existing service agreements between that company and its platform staff already contained a term similar to that which I have quoted from the board's brown book of 1937. This the board repeated in its own contracts with the men, whereas it ought to have realised the difference made by the Act in its own freedom of contract by reason of the fact that it was a public authority, whereas the company had not been one, and it ought, therefore, to have omitted the clause which differentiated between members of the Transport and General Workers' Union and others. Non-union men may have been equally at a disadvantage under the company, but the company had committed no offence, because it was not a public authority. When the board took over, it came automatically under the statutory duty. However, it made no change, either then or after the strike of 1937, or even in 1938, when the new union was formed. Then at least the board was faced directly with the problem of inequality, and ought to have realised that the men of the new union, whether previously they belonged to the Transport and General Workers' Union or to no union, would certainly be "liable to be placed directly or indirectly [through the operation of the trade union rules] under a disability or disadvantage in respect of appeals" as compared with men of the Transport and General Workers' Union. The board ought forthwith to have informed the Transport and General Workers' Union that they had inadvertently committed a breach of the law, and that they must eliminate the privileged position of that union, and make a general amendment of the representation clause in respect of appeals, so as to extend equality of advantage alike to men of the one union and to those of the other, and also to non-unionists. A similar consideration seems to apply to cl. 12 of the conditions of employment on p. 13 of the brown book in regard to medical examination, which exposes men not in the Transport and General Workers' Union to a disability or disadvantage. However, the board adopted both clauses unaltered, and apparently did not even raise the matter with the Transport and General Workers' Union. The whole question of sect. 6 of the Act probably escaped notice, but the maintenance of the representation clause as an integral condition of the contract of employment was—and is, I think—a continuing breach of the statute.

There is, however, another angle from which the facts before us deserve consideration, but this matter does not call for decision, because it was not definitely raised or argued. Let me suppose that the peccant term had been absent from the contract of employment, so that there had been in it no contractual condition contrary to the statute, but nevertheless that, on the plaintiff's making his request to the disciplinary board for permission to be represented by the secretary of the National

Passenger Workers' Union, he had been met with the answer (which was in fact made) that, whilst the board would allow an official of the Transport and General Workers' Union to appear and represent him, they would not allow an official of the National Passenger Workers' Union to do so. Would not that conduct have involved a breach of the section? Would not the defendant board have thereby "imposed a condition" on the plaintiff, which was forbidden? I am disposed to think that the right answer would be in the affirmative. The act of the board, on my hypothesis, would not merely have exposed the plaintiff to a "liability or disadvantage," but would actually and directly have put him under a present disadvantage, as compared with what his position would have been if he had been an effective member of the Transport and General Workers' Union, as, indeed, was shown by the plaintiff's own conduct. He recognised at once the fact of disadvantage, and abandoned his appeal, obviously because he did not feel able to stand up to the task of arguing his case alone, without the advantage of skilled help. The chief contention for the board submitted to us by counsel for the respondents was that the word "condition" in subsect. (1) means a contractual condition, and nothing else, and that the scope of the subsection is limited to conditions which actually form terms of the contract of employment, and are, therefore, capable of being "avoided" by subsect. (3). Even as to the first half of subsect. (1) I cannot accede wholly to that contention, for in that half, although the word is there used mainly in the sense of a term already part of a contract of employment, it would cover the making of a mere offer which, if and when accepted, would form such a contract, and also the making of a threat to terminate an actual contract of employment containing no such condition, unless the employee would consent to vary its terms by agreeing to incorporate a condition of the kind prohibited. In these two cases, it is the attempt to impose the condition by obtaining a contractual consent which would constitute the offence. In the second half of the subsection, however, I can see no reason for construing the statutory prohibition as so limited to a contractual sense, whether strict or loose. On my hypothesis that the contract contained no contractual condition of the forbidden kind, what was the statutory position when the defendant board announced to the plaintiff their decision that he could not be represented by any trade union official outside the Transport and General Workers' Union? Surely it was that the board was guilty of the forbidden act of "imposing a condition which put him at a disadvantage," and I cannot see that the presence of the condition in the contract makes that act any the less unlawful.

The word "condition" is—or, at any rate, was often in the past—used in English law as a synonym for "status," as applied to a person, and personal status or condition imports a bundle of rights and liabilities, powers and disabilities, advantages and disadvantages, attaching to the particular status in question. In that wider sense, the word is not inapt

to cover such prejudicial effect upon the status of an employee in regard to his right of representation as would necessarily result from the board's intimation to the plaintiff on the occasion of his appeal. From the prohibition imported by the opening words of the section—namely, “It shall not be lawful”—and the absence of any special procedure for the

A enforcement of the new statutory duties created by subsect. (1) and subsect. (2), it follows, in my opinion, that breaches of those subsections are indictable offences, the remedy afforded by subsect. (3) being insufficient to exclude the ordinary rule of interpretation; *R. v. Buchanan* (1) and *Osborne v. Milman* (2), at pp. 474, 475, per LORD

B ESHER and BOWEN, L.J., and the analysis of the legal history of the rule by CHARLES, J., in *R. v. Hall* (3).

The essence of the section lies in its impartial neutrality of attitude in regard to trade unions, an attitude free from favour towards either members or non-members. It insists on simple equality of treatment,

C and its language is wide enough also to forbid any discrimination between one union and another. It is plain that Parliament intended the principle of equal treatment to be applied thoroughly, and that feature of the section affords an additional reason for construing the section as applying beyond the primary case of contractual conditions,

D and as embracing in its prohibition all conduct falling within the same mischief. I see no reason for limiting the prohibition of this section to merely contractual conditions any more than for limiting the prohibition of undue preference and its correlative unfair prejudice contained in the Railway and Canal Traffic Act, 1854, s. 2, where any

E conduct of the prohibited kind was aimed at by Parliament.

It was submitted for the respondent board, though somewhat faintly, that there was no evidence in the present case of any such pre-existing claim of right and denial of it as was contended for the defendant board to be essential to a declaratory judgment under R.S.C., Ord. 25, r. 5.

F It is unnecessary to discuss that contention, for in the present case there was ample ground for treating the disputants as already ranged on opposite sides.

I have had the advantage of reading the judgment of LUXMOORE, L.J., in which CLAUSON, L.J., concurs. So far as concerns what I have called

G the first breach of the section, I agree that the form of declaration which they suggest appropriately covers the insistence by the defendant board on the unlawful condition contained in the written contract. On the other hand, I still think that the section is not limited merely to conditions in a contract, and, for the reasons I have given, if the plaintiff

H had asked for a second declaration, I should have been ready to have given it to him. The condition in the contract being unlawful and avoided by subsect. (3), the board was in the same position as if there had been no such term as there in fact was in the contract, and, therefore, as if they had merely volunteered the intimation: “We give you leave to be represented by the secretary of the Transport and General

Workers' Union, but we will not allow anyone else to represent you." That would have been an act of unlawful differentiation to the prejudice of the plaintiff, constituting, as I think, an imposition of a "condition" contrary to the section. However, LUXMOORE and CLAUSON, L.JJ., do not concur in that course, and the order of the court will, therefore, only include the declaration as stated in their judgment. The order of MORTON, J., will be discharged, and I agree with the order my brethren propose as regards costs. A

CLAUSON, L.J. : The judgment which LUXMOORE, L.J., is about to read is that of himself and myself. B

LUXMOORE, L.J. : The question involved in this appeal is whether the London Passenger Transport Board (hereinafter called the transport board) has infringed the Trade Disputes and Trade Unions Act, 1927, s. 6, which provides by subsect. (1) that it shall not be lawful for any local or other public authority to make it a condition of the employment or continuance in employment of any person that he shall not be a member of a trade union, or to impose any condition upon persons employed by the authority whereby employees who are or who are not members of a trade union are liable to be placed in any respect, either directly or indirectly, under any disability or disadvantage as compared with other employees, and, by subsect. (3), that any condition imposed in contravention of this section shall be void. The transport board is admittedly a public authority, and, therefore, subject to the provisions of the section. There is no doubt that the object of the section was to prevent any local or other public authority from making it a condition that any of its employees should or should not be members of a trade union, or from inducing any of such employees, either directly or indirectly, to become members of a trade union or cease to be members thereof. The section is obviously divisible into two parts. The first part relates to express conditions requiring membership or non-membership, while the second part relates to the direct or indirect inducement to become or cease to be members of a trade union. It seems to us plain that each part of the section covers the case of membership or non-membership of a particular trade union just as much as it covers the case of membership or non-membership of any unspecified trade union. Obviously, under the second branch of the section, any condition of employment which gives a particular employee any advantage over other employees dependent on membership of a particular trade union or of any trade union or on non-membership may be a direct or indirect inducement to other employees to become or cease to be members of the particular union or of some trade union. In either case, such condition would be contrary to the section, and, therefore, void. C D E F G H

There is no dispute of fact in the present case. The facts material to be stated are these. The plaintiff, who was, and is, a motor omnibus

driver, entered the employment of the London General Omnibus Co. (hereinafter called the omnibus company) on Apr. 12, 1928. A week or two after his employment by the omnibus company, he joined the Transport and General Workers' Union (hereinafter called the transport union). The omnibus company was not a public authority, and, therefore, the Trade Disputes and Trade Unions Act, 1927, s. 6, had no application to the plaintiff's agreement of employment, but one of the terms of that agreement was as follows :

Appeals in respect of any disciplinary action shall be heard weekly before a properly constituted disciplinary board. Drivers and conductors attending such appeals shall be allowed . . . to be accompanied by a representative of the union.

The union referred to in this provision is the transport union. Until 1938 this was the only trade union concerned with motor omnibus drivers and conductors. In 1933 the transport board was constituted under and by virtue of the London Passenger Transport Act, 1933, and the omnibus company was thereby incorporated in the transport board, and ceased to exist as a separate entity. From that date, the transport board became the employers of the plaintiff and other drivers and conductors of the omnibus company in succession to it. The terms of the plaintiff's employment remained unaltered, and were the same as those in force with the omnibus company, until June 15, 1937, when an agreement was made by the transport board and the transport union. This agreement resulted from the settlement of a strike of bus drivers and conductors which took place shortly before the agreement was made. The agreement was printed and circulated among all the employees of the transport board in the form of a booklet which was referred to during the hearing of the appeal as the brown book. The agreement is entitled :

Memorandum of agreement between the London Passenger Transport Board and the Transport and General Workers' Union as to rates of pay and conditions of service. Drivers and conductors.

It has been, and is, the basis of the employment of every employee of the transport board. The agreement comprises two parts. The first part relates to rates of pay, while the second part relates to conditions of employment. In addition, there is a schedule to the agreement which relates to various matters which may arise in the course of the employment of employees of the transport board. Clause 3 of this schedule, which relates to appeals, is in the following terms :

9. Appeals. Appeals against depot superintendents' decisions shall be heard by the divisional superintendent concerned. Divisional superintendents may also hear charges in the first instance, according to the gravity of the charge. Appeals against the decisions of the divisional superintendents shall be heard weekly before a properly constituted disciplinary board. There may be a final appeal to the general manager or his representative. Drivers and conductors attending such appeals shall be allowed to appear in plain clothes. Drivers and conductors appearing before a divisional superintendent or on appeal may be accompanied by an official of the union. If the appeal succeeds, the appellant shall be entitled to pay for the time lost.

The union referred to in this clause is defined by the agreement to be the transport union.

After the strike, the plaintiff continued his employment with the transport board, and the provision as to appeals last referred to became a term of his employment. It is plain that the only representation permitted to an employee of the transport board under the provision as to appeals on any appeal to a divisional superintendent or to the disciplinary board is by an official of the transport union. It is admitted that no such official of the transport union would be allowed by that union to appear for any employee of the transport board who was not a member of the transport union, or who, being a member thereof, was not entitled to benefit under the rules of that union—that is, was not more than 6 weeks in arrear with his subscriptions—and that, consequently, no employee of the transport board who, being a member of the transport union, was not entitled to benefit, or, not being a member of the transport union, whether or not he was a member of some other union, could in fact obtain the benefit of representation at any appeal of the nature specified. This fact was admittedly known to the transport board and to everyone concerned.

The plaintiff, as already stated, joined the transport union shortly after Apr. 12, 1928, and he remained a member thereof until he ceased to pay his contributions thereto. In or before Dec., 1937, he ceased to be a member of the transport union. In Feb., 1938, the plaintiff joined the National Passenger Workers' Union (hereinafter called the national union), which had then recently been formed. In Feb., 1939, a question arose as to whether or not the plaintiff had been guilty of some breach of duty. The matter came before the depot superintendent, and the plaintiff was cautioned. The plaintiff appealed to the divisional superintendent, who affirmed the decision of the depot superintendent, and thereupon the plaintiff appealed to the disciplinary board. The hearing of this appeal was fixed for Apr. 18, 1939, and the plaintiff presented himself on that day accompanied by the general secretary of the national union, who was prepared to present the plaintiff's case and to represent him before the disciplinary board. The transport board refused to allow the secretary of the national union to appear before it, and in consequence the plaintiff declined to proceed with his appeal. On May 18, 1939, the plaintiff instituted this action against the transport board claiming a declaration that the condition of his employment with the transport board whereby he was denied, as an appellant before the defendants' disciplinary board, the advantage of representation by an official of his own trade union, while such advantage was granted to, or was the right of, other servants of the defendants who were members of another and their own trade union, was unlawful. The plaintiff also claimed an injunction to restrain the defendants, their servants and agents from enforcing such a condition as aforesaid. The action was heard by MORTON, J., on May 8, 9, 1940. Judgment was reserved, and

was delivered on May 27, 1940. The judge held that the transport board's permission to its employees to appear on the specified appeals by an official of the transport union was not the imposition of a condition by the board, but was the grant by it of a privilege, presumably to all its employees. It is difficult to follow this argument, for, although

A the transport board could not be compelled to allow any of its employees to be represented by some third person on disciplinary matters, yet, by purporting to allow representation in such matters to a particular class of persons who, to the knowledge of the transport board, would be bound to refuse to represent persons who were not members of the transport

B union, the transport board was in fact providing by its conditions of employment that some employees should be entitled to be represented on disciplinary appeals while others should not be so entitled. If this right of representation be termed a privilege, it was one which was granted to a particular class of employee—namely, members of the

C transport union in benefit—and was not available to any other employees—namely, members of the transport union not in benefit, members of any other trade union, and employees who were not members of any trade union. So far as the employees who cannot take advantage of the so-called privilege are concerned, it is a condition of their employ-

D ment that they cannot be represented at disciplinary appeals, and they are consequently under a disability or disadvantage so far as their position is comparable to that of employees who are members of the transport union in benefit. Further, it seems plain that, if the transport board refused to allow a member of the transport union in benefit to

E appear before a disciplinary board by an official of the transport union, such refusal would constitute a breach of that member's terms or conditions of employment. The judge stated that it was, in his view, a misuse of language to call the provision with regard to representation at appeals a condition of service, because in fact it conferred a privilege.

F The section speaks of the imposition of a condition on any persons employed by the authority whereby employees of a particular class are liable to be placed in any respect under any disability or disadvantage as compared with other employees. This provision must, we think, by necessary implication include its converse—namely, that the authority

G shall not impose any condition of employment whereby employees of a particular class are placed at an advantage as compared with other employees. It is to be observed that the provisions in the brown book as to appeals are to be found under the comprehensive title "Conditions of service." With all respect to the judge, we are unable to appreciate

H how it can be said to be a misuse of language to refer to an advantageous term of service as a condition of employment. It seems to us that the judge has implied from the use of the word "impose" a limitation on the meaning of the term "conditions of employment" so as to exclude any condition which might be advantageous to an employee or to a particular class of employee. We see no reason for any such implication.

The object of the section is, as we have already stated, to ensure that no public authority shall either directly or indirectly compel or induce any of its employees to become or remain a member, or refrain from becoming or cease to be a member, of any trade union. We think that, having regard to the object of the section and the context in which it is found, the words "impose any condition upon" have no narrower meaning than "make it a condition of employment." The difficulty of supporting the narrower construction became apparent when counsel for the respondents was driven to argue that the question of the validity of any condition of the nature described in the section or implied therein must depend on the answer to the question: "Who suggested the incorporation of the condition under consideration?" because, if it was suggested by the transport union or by the employees, or any of them, it could not be said to be a condition imposed by the public authority, with the extraordinary result that, if the condition had been suggested by the transport board, it would be void, while, if it had been suggested by any other body not being a public body—e.g., by the transport union, or by any of the employees of the transport board—it would be valid.

The plaintiff by his writ and in his pleadings stated that the condition of which he complained is one whereby he is :

... denied as an appellant before the defendants' disciplinary board the advantage of representation by an official of his own trade union . . .

He claimed, in effect, that a condition entitling him to be represented by an official of his own trade union on disciplinary appeals should be read into his own contract of employment in order to render valid the condition in favour of a member of the transport union in benefit conferred by cl. 3 of the schedule to the agreement of June 15, 1937.

The judge asked himself when such a condition as that claimed by the plaintiff was imposed, and came to the conclusion that the answer was that it never had been imposed. We respectfully agree with that conclusion. Further, it seems to us that even if the condition which the plaintiff claimed ought to be read into his contract of employment was read into it, such condition would itself be contrary to the provisions of sect. 6, because it would give to employees who are members of any trade union an advantage which would not be available to employees who are not members of any trade union. This was pointed out to counsel for the appellant at an early stage of the hearing of the appeal, and he asked leave to amend the form of the declaration, and there was considerable argument as to the form it should take. Since the hearing, we have further considered the question of the form of declaration to which the plaintiff is entitled, and we have come to the conclusion that he is entitled to a declaration :

... that the condition in regard to representation by an official of the transport union imposed as part of the terms of employment of employees of the transport board by the provisions of cl. 3 in the schedule to the memorandum of agreement of June 15, 1937, implies upon its true construction that no employee unless he be a

member of the transport union shall be entitled to be represented on the hearing of an appeal by any person, and that the said condition is accordingly void by virtue of the Trade Disputes Act, 1927, s. 6.

A This form of declaration seems to us to be unobjectionable, because it places all employees, whether or not members of any trade union, including the members of the transport union, whether or not in benefit, on the same footing with regard to appeals in disciplinary matters. This declaration and the argument in support of it were not submitted to MORTON, J., and, therefore, his mind was not directed to what seems to us to be the substantial point in the case. For the reasons stated, B we think that the plaintiff is entitled to have the order of MORTON, J., so far as it directs that the action should be dismissed, discharged, and to have a declaration in the amended form previously stated in this judgment, with liberty to apply for the appropriate injunction if necessary. Having regard to the late stage at which the point was raised, C we think that the order as to costs in the court below should stand, and that there should be no costs of the appeal.

Before parting with the case, we think it right to add that, although there was no argument directed to the point, it seems probable that there are other terms in the conditions of service set out in the brown book which infringe the provisions of the Trade Disputes and Trade D Unions Act, 1927, s. 6, and are, therefore, void. For example, the provisions in cl. 12 (see brown book, p. 13) with regard to medical examinations appear to expose to disability or disadvantage men not members of the transport union in benefit.

E *Order discharged. No order as to costs. Leave to appeal to the House of Lords.*

Solicitors: *Cole & Matthews* (for the appellant); *R. B. McDonald* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

F KITE v. BROWN.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Hawke and Humphreys, JJ.), **October 30, 1940.**]

G *Emergency Legislation—Food control—Rationing restrictions—Charge of supplying unregistered customer with rationed food—Further charge of supplying rationed food without coupon—Whether two offences committed—Charge of supplying two different rationed foods—Whether information bad for duplicity—Rationing Order, 1939 (S. R. & O., 1939, No. 1856), arts. 2, 7 (a), (c).*

H *Magistrates—Summary jurisdiction—Information—Separate charges of two offences—Charge of selling rationed food naming two different kinds of rationed food—Duplicity.*

The appellant, a retail trader, was charged and convicted under two informations with having unlawfully supplied rationed food to B. H. The first charge was that of having supplied rationed food to B. H., "she being the holder of a general ration book and not being registered" with the appellant, and the second charge was that of having supplied

to the same person "½ lb. of butter for household consumption without a coupon." It was objected that the informations were in respect of only one offence, and should not have been charged separately:—

HELD: two definite offences had been committed, and there was no difficulty in making each offence the subject of a separate charge.

The appellant was also charged and convicted under two further informations, the first charge being that of supplying rationed food "to wit ½ lb. butter and ½ lb. bacon to Dorothy Marion Tyrrell for household consumption she being the holder of a general ration book, and not being registered" with the appellant, and the second being that of supplying ½ lb. of bacon and ½ lb. of butter to her without a coupon. It was objected that the two informations were bad for duplicity:—

HELD: the offence was that of supplying rationed food for household consumption, and the fact that two different articles of rationed food were supplied in no wise made the informations bad for duplicity.

[EDITORIAL NOTE.] For the purposes of this case, it seems essential to remember that the regulations are so drawn that the principal offence is one of supplying rationed food. It is, therefore, only one offence if the supply is of various kinds of rationed food at the same time. On the other hand, the regulations have dealt quite separately with the supply to an unregistered customer and with the supply without the surrender of the appropriate coupon. The supply to an unregistered customer can, therefore, be considered an offence distinct from that of the supply without the surrender of the appropriate coupon. It is, of course, necessary to include only one offence in one information.

AS TO CONTENTS OF INFORMATION, see HALSBURY, Hailsham Edn., Vol. 21, pp. 599, 600, para. 1044; and FOR CASES, see DIGEST, Vol. 33, pp. 322-324, Nos. 367-388.]

Cases referred to:

- (1) *R. v. Kenny* (1929), 21 Cr. App. Rep. 78; Digest Supp.
- (2) *R. v. Hammick, Ex p. Murdoch* (1918), 87 L.J.K.B. 846; 14 Digest 223, 2064.

CASE STATED by the justices for the borough of Gravesend for the opinion of the court as to whether or not the facts showed that in one case the accused had been charged with the same offence in two informations and as to whether or not the information in another case charged the accused with two offences and was bad for duplicity. The appellant was a retailer of butter and bacon, both rationed foods, which, under the Rationing Order, 1939 (made under the Defence (General) Regulations, 1939, reg. 55), were not to be supplied for household consumption except by a retailer with whom the purchaser was registered and to whom the purchaser surrendered the appropriate coupons. On Feb. 2, 1940, Beatrice Hammond purchased at the appellant's shop ½ lb. of butter. She was the holder of a general ration book, but had not registered with the appellant, nor did she surrender the appropriate coupon to the appellant's servant at the time of the purchase. Similar facts were proved with regard to the purchase of ½ lb. of bacon by Helen Gosling, and with regard to the purchase of ½ lb. of butter and ½ lb. of bacon by Dorothy Marion Tyrrell on the same day. In the case of the last purchase, the supply was by the appellant himself. In respect of the first sale to Beatrice Hammond, the appellant was charged in one

- information with supplying her with rationed food, "to wit, $\frac{1}{2}$ lb. of butter, for household consumption, she being the holder of a general ration book, and not being registered" with the appellant. In another information he was charged with supplying her with the same butter without a coupon. Similar informations were issued in respect of the
- A supply to Helen Gosling. In the case of the supply to Dorothy Marion Tyrrell, each information related to the supply for household consumption of rationed food, "to wit, $\frac{1}{2}$ lb. of butter and $\frac{1}{2}$ lb. of bacon," one information being based on the absence of registration and the other on supply without a coupon. It was contended that, in the cases of
- B Beatrice Hammond and Helen Gosling, one offence was made the subject of two informations, and that, in the case of Dorothy Marion Tyrrell, two offences were charged in the one information.

The Rationing Order, 1939, art. 2, provides as follows :

- C Except under the authority of the Minister or under and in accordance with the provisions of this order or any directions or licence issued thereunder, a person shall not obtain or attempt to obtain, or supply or offer or attempt to supply any rationed food for household consumption, or any rationed food for the purposes of any establishment.

Art. 7 provides as follows :

- D Except where the Minister shall otherwise authorise, no person may obtain any rationed food for household consumption unless the following conditions are complied with :—(a) A person who is the holder of a general or child's ration book shall obtain rationed food only from a retailer with whom he shall be registered in accordance with directions of the Minister. . . . (c) The appropriate coupon or coupons representing the amount of food obtained must be detached and retained by the retailer and no more may be obtained on any coupon than the amount prescribed for such coupon. . . .

- E *W. Dudley Collard* for the appellant.
Vernon Gattie for the respondent.

- F VISCOUNT CALDECOTE, L.C.J. : Two points are taken upon these informations and the convictions which took place. There are three persons concerned as the persons to whom the rationed food was supplied. The first two informations relate to supplies to Beatrice Hammond. The charge was that the rationed food was supplied to her :

- G . . . she being the holder of a general ration book and not being registered [with the appellant].

- There is another charge relating to the supply of rationed food to the same person. The charge in this case is " $\frac{1}{2}$ lb. of butter," the same $\frac{1}{2}$ lb. of butter, to Beatrice Hammond, the same person, "for household consumption without a coupon."
- H

Counsel for the appellant, who has said everything possible in this case, takes objection that the two informations are in respect of what he says was only one offence. For the purposes of his argument, he has referred us to *R. v. Kenny* (1). The report of that case is not very satisfactory, because, although the appeal in that case was against the

sentence, the decision of the court, as reported, was to quash the convictions. The charge there was a double one, and the appellant pleaded guilty, first, to pavilion-breaking and larceny, and, secondly, to committing malicious damage. He was convicted of both offences and sentenced to two concurrent terms of imprisonment. In giving the decision of the court, LORD HEWART, L.C.J., said that the malicious damage was an incident to the breaking in, but nevertheless the appellant was sentenced in respect of each offence as though they were distinct offences. Thereupon he gave as the judgment of the court a decision that the conviction for malicious damage would be quashed, and that the sentence in respect of pavilion-breaking would be reduced from a sentence of penal servitude to one of 12 months' imprisonment with hard labour. I am unable to derive any assistance from that case, and the question might possibly arise, if it were necessary to look into it, whether it has been properly reported. A B

However, I have clearly come to the conclusion that, in the present case, there were two definite offences, one possibly more serious than the other, and I am unable to see any difficulty in the course which was followed here of charging the appellant with the offence, first, of supplying rationed food to someone who was not registered with him, and, secondly, of supplying rationed food to the same person for her household consumption without a coupon being delivered up. I think that the first objection is a bad one, and fails. C D

With regard to the third pair of informations—namely, those relating to Dorothy Marion Tyrrell—the first information was for supplying rationed food : E

... to wit $\frac{1}{2}$ lb. butter and $\frac{1}{2}$ lb. bacon to Dorothy Marion Tyrrell for household consumption she being the holder of a general ration book, and not being registered [with the appellant].

There was another charge for supplying $\frac{1}{2}$ lb. of bacon and $\frac{1}{2}$ lb. of butter to her without a coupon. The objection is taken that those two informations were bad for duplicity, but, as has been pointed out in the course of the argument, the alleged offence under the Rationing Order, 1939, art. 2, is that of having supplied rationed food for household consumption not under and in accordance with the provisions of the order. The particularisation of the rationed food seems to me in no way to affect the information. It is quite true that $\frac{1}{2}$ lb. of butter and $\frac{1}{2}$ lb. of bacon are mentioned, and there might have been an offence charged by saying $\frac{1}{2}$ lb. of butter or $\frac{1}{2}$ lb. of bacon, but the offence seems to me to be rightly charged here as being having supplied rationed food. The fact that two different articles of rationed food were supplied in no wise makes the information in question bad for duplicity. In my opinion, there is nothing in the second point, and the case to which we were referred, *R. v. Hammick, Ex p. Murdoch* (2), under a very different order, seems to me not to affect the opinion I have formed. Therefore, I have come to the conclusion that all the convictions were legally and F G H

properly made, and in each case the conviction will stand. The appeal will be dismissed.

HAWKE, J. : I agree.

HUMPHREYS, J. : I agree.

A *Appeal dismissed with costs.*

Solicitors : *Thomas H. Church*, Gravesend (for the appellant) ; *Watkins, Pulleyn & Ellison*, agents for *H. H. Brown*, Town Clerk, Gravesend (for the respondent).

B [Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.]

R. HOE & CO., LTD. v. DIRS.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.J.J.), **October 31, 1940.**]

Workmen's Compensation—Application to review—Workman's loss of eye—Offer of employment—Danger of injury to remaining eye—Whether "suitable employment"—Workmen's Compensation Act, 1925 (c. 84), s. 9 (3) (i).

D A workman, employed as a fitter, lost the use of an eye as the result of an accident which occurred in the course of his employment. He received compensation at the maximum rate. The workman subsequently obtained employment as a nurseryman, and, by agreement, the compensation was reduced to 19s. 2d. per week. Shortly after the outbreak of war, the workman became unemployed. He was later offered work as a fitter, but did not accept it. His contention was that, although the work was suitable for a man having the use of both eyes, it was unsuitable in that it involved risk of injury to the eye for a man who had lost the use of one eye :—

E **HELD :** in the circumstances, the offer of employment as a fitter was not an offer to the respondent of "suitable employment", and he was justified in not accepting it.

[**EDITORIAL NOTE.** The question involved here is whether a workman, suffering from permanent results of a first accident, is entitled to refuse work as unsuitable because a subsequent accident would be more disastrous to him having regard to physical defects produced by the original accident. This matter has been before the courts on several occasions and, though different opinions have been expressed, the trend of opinion seems to have been that the risk of blindness in the event of an accident to the remaining eye is a factor to be taken into consideration when determining the question of the suitability of the employment. That question, however, would seem to be always a question of fact, and, if a judge of fact had that consideration before him and decided that the employment was suitable, it might be difficult to upset such a finding on appeal. For this reason it is thought that it would be dangerous to regard the decision herein as definitely establishing a principle.

H AS TO SUITABILITY OF EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 34, pp. 916, 917, para. 1260 ; and FOR CASES, see DIGEST, Vol. 34, pp. 417, 418, Nos. 3384-3392. See also WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 301-303.]

Cases referred to :

(1) *Eyre v. Houghton Main Colliery Co., Ltd.*, [1910] 1 K.B. 695 ; 34 Digest 417, 3385 ; 79 L.J.K.B. 698 ; 102 L.T. 385 ; 3 B.W.C.C. 250.

- (2) *Jackson v. Hunslet Engine Co., Ltd.*, [1916] 2 K.B. 8; 34 Digest 417, 3389; 85 L.J.K.B. 1213; 114 L.T. 584; 9 B.W.C.C. 269.
- (3) *Hargreaves v. Haughhead Coal Co., Ltd.*, [1912] A.C. 319; 34 Digest 346, 2790; 81 L.J.P.C. 167; 106 L.T. 468; 5 B.W.C.C. 445.
- (4) *Law v. Baird (William) & Co., Ltd.* (1914), 7 B.W.C.C. 846; 34 Digest 418, case 3392 i.
- (5) *Harris v. Associated Portland Cement Manufacturers, Ltd.*, [1939] A.C. 71; A [1938] 4 All E.R. 831; Digest Supp.; 108 L.J.K.B. 145; 160 L.T. 187; 31 B.W.C.C. 434.
- (6) *Morton & Co., Ltd. v. Woodward*, [1902] 2 K.B. 276; 34 Digest 430, 3503; 71 L.J.K.B. 736; 86 L.T. 878; 4 W.C.C. 143.

APPEAL by the applicants from an award made in favour of the respondent by His Honour JUDGE BENSLEY WELLS at Southwark County Court, dated July 12, 1940. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

J. H. C. Goldie for the appellants.

W. H. Duckworth for the respondent.

Goldie: The first point is as to the material date. The dispute between the parties had arisen before the matter came before the registrar on the application for leave to issue execution. Upon the authorities, the county court judge would have been entitled to antedate his award: *Morton & Co., Ltd. v. Woodward* (6). The date of the application was Apr. 19, 1940. The Undertakings (Restriction on Engagement) Order, 1940, came into force on June 10, 1940. If the workman had chosen to accept the employment offered him at Vickers before this order came into operation, he would have been employed at Vickers at the time when the county court judge dealt with the matter. If the workman ought to have accepted the offer of work at Vickers, he was acting unreasonably in continuing as a nurseryman. The second point is as to whether or not there was any evidence of danger to the workman's remaining eye if he accepted employment as a fitter. There has been some evidence which enabled the court to come to the conclusion that the work was not suitable in all other cases where the court has so decided. Thirdly, there arises the question whether or not, if there was a risk of danger to the remaining eye, that was a circumstance which the county court judge was entitled to take into account. *Hargreaves v. Haughhead Coal Co., Ltd.* (3) shows that, when one is considering suitability, the possibility of a man losing his second eye cannot be considered. It is necessary to consider the word "suitable" in the light of the decisions of the House of Lords. On the logic of the matter, and in view of the decision in *Hargreaves'* case (3), this appeal should be allowed. [Counsel referred to *Eyre v. Houghton Main Colliery Co., Ltd.* (1), *Jackson v. Hunslet Engine Co., Ltd.* (2) and *Law v. Baird (William) & Co., Ltd.* (4).]

Counsel for the respondent was not called upon.

SIR WILFRID GREENE, M.R.: This is an appeal by the employers against an award in favour of the workman, made upon the employers'

application to review. The workman was employed as a fitter by the employers. He was a highly skilled man, and his work involved the use of precision tools. On Aug. 28, 1933, an accident happened to him. A drill broke, and a piece struck him in the left eye, with the result that for all practical purposes that eye is useless to him. He obtained compensation, and later he secured work as a nurseryman. As a result of that, it was agreed between him and the employers that his full compensation should be reduced to a sum of 19s. 2d. per week.

On the outbreak of war, that work was temporarily lost to him. On Mar. 19, 1940, he was informed by the employers that work was available to him as a fitter at Vickers. That suggestion he did not take up, but on Apr. 1, 1940, he resumed his employment as a nurseryman at the average wage of £2 9s. per week. On Apr. 19, pursuant to what had been arranged before he actually went back to work, the employers began the present proceedings. On June 10, 1940, the Undertakings (Restriction on Engagement) Order, 1940, came into force. The short effect of that order, so far as it is relevant to the present case, was that the workman, being employed, as he was employed, as a nurseryman, was a man whom no other employer could seek to engage in any other occupation. Accordingly, as from that date, the work at Vickers, assuming that otherwise he would have been able to accept it, or ought to have accepted it, would not have been open to him.

The first question which arises for decision really turns upon the meaning of one word, read in its context, in the Workmen's Compensation Act, 1925, s. 9 (3) (i). That paragraph sets out the rules for calculating the weekly payment in the case of partial incapacity. It is to be

... one-half the difference between the amount of the average weekly earnings of the workman before the accident and the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.

The word which falls to be construed is the word "suitable."

The work which was apparently open to him at Vickers in Mar., 1940, was work which involved danger to the eyes. When giving evidence, the workman was shown some special glasses with protecting sides, and he said that the risk to the eyes while at work in the fitters' shop would be greatly reduced by such glasses. Counsel for the appellants informed us that the answer of the witness was a little stronger than that—namely, that the risk would be practically or almost entirely eliminated, or words to that effect. However, the workman said in re-examination that, since the accident, when he was still working as a fitter, he had had his glasses broken.

Even admitting the correction by counsel for the appellants, if it be justified, of the judge's note, it seems to me still to leave the matter in this position. Although the protecting sides would give the workman substantial protection against the risk at the sides, the risk of a direct injury to the eye through the glasses being fractured still remained.

The head foreman of the fitting department of Vickers, who was called as a witness, said that there was always a risk to the eyes in the work of fitters. The county court judge, in dealing with that part of the case, held as a fact that men employed as fitters in any engineering shop must run a risk of injury to the eyes. In my opinion, there was ample evidence to justify him in that conclusion.

Assuming that work in the fitters' shop would have been available to this workman, the question then arises whether, for the purpose of measuring his weekly payment in respect of the original accident, he is to be treated as in effect bound to accept that employment so as to reduce the employers' liability in respect of the original accident. Was such employment suitable? It does not require evidence to show that the loss of the remaining eye of a one-eyed man is a very much more serious thing than the loss of one eye to a two-eyed man. The great controversy in the present case has been whether or not that circumstance is one which can be taken into consideration in deciding the question whether or not a particular occupation offered is "suitable," in the circumstances.

If I may express my opinion, quite apart from anything which has been said before on this topic, I must confess that I can find no real difficulty in construing the word "suitable" in relation to the facts of this case. It seems to me, first, that the word "suitable" is a word which is relative to the man. It is not "suitable" for anybody. It is "suitable" for this man. The physical condition of this man, by reason of the former accident, is such that the risks which he would run would be much more serious than those run by ordinary normal men in a similar occupation. Once it is realised that the question is whether the work is suitable for a one-eyed man, and not whether it is suitable for men in general, it seems to me quite impossible to eliminate from consideration the crucial fact that the man in question has only one eye. The fact that he has only one eye is due to the accident which he has suffered. Is he to be forced to surrender part of the compensation to which the original accident entitled him and to take up an employment of this character? In my opinion, looking at the matter quite apart from authority, the answer to that question is reasonably clear. However, I feel some difficulty in asserting that it is reasonably clear, because it has been a matter which has led to some difference of judicial opinion.

I do not propose to go through the cases which have been cited to us. The first is *Eyre v. Houghton Main Colliery Co. Ltd.* (1). It is, sufficient to say that in that case FLETCHER MOULTON, L.J., taking a view different from that of BUCKLEY, L.J., considered that the fact that a man had one eye, and that the loss of an eye would be a matter of much greater seriousness to him than it would be to people with two eyes, was a factor which might properly be taken into consideration in determining whether or not a particular job was suitable for a particular

man. BUCKLEY, L.J., did not agree with that view, and, if I read his judgment rightly, SIR H. H. COZENS HARDY, M.R., did not express an opinion upon it.

In *Jackson v. Hunslet Engine Co., Ltd.* (2), LORD COZENS HARDY agreed with what FLETCHER MOULTON, L.J., had said in *Eyre's* case (1),
A and so did SARGANT, J., but PHILLIMORE, L.J., disagreed.

If it is open to me to decide this question according to my own opinion, unfettered by authority, I should decide it in the way which I have indicated. If there is authority upon it which is binding upon us, it appears to me to be authority upon that side. However, I apprehend
B that the question is really open. Therefore, our decision is one which decides that point.

It was said that *Hargreaves v. Haughhead Coal Co., Ltd.* (3), a decision of the House of Lords, really assisted the argument of the employers here. With great respect, I cannot see what bearing that case
C has upon the present question. The present question deals with particular language in a particular section and its applicability to a particular set of facts. I cannot find that the point in *Hargreaves'* case (3) has any real bearing upon the present case, or deals with any principle which is common to that case and to this.

D One further case was cited, *Law v. Baird (William) & Co., Ltd.* (4), which is a Scottish case. It was cited for the purpose of calling our attention to a view expressed by the Lord President to the effect that, if the consequences of the loss of the remaining eye were legitimate matters to be taken into account, the effect would be to cause the
E employer in whose employment the alleged accident took place to assume responsibility for a contingent accident to the remaining eye in future, which might or might not take place. There may be some defect in the logical working of my mind, but, speaking with great respect to that argument, I am not able to follow it. It does not seem
F to me that the effect is to make the employer liable in respect of an accident which may happen in the future quite unconnected with the original accident. The true effect seems to me to be that, the original accident having occurred in the employment of the employer, the man's position and physical status as a workman are entirely changed, and
G that he is to be dealt with on the footing that he is an injured man, and his injury has put him in such a position that what would be a legitimate risk for an ordinary man to take has become to him a risk which it is wholly unreasonable to ask him to take. That circumstance seems to me to flow from the original accident.

H There was another point. In the appeal, it was said that the county court judge ought to have regarded the position as at the date when the application for review was made. The point of that is that he treated himself as entitled to consider the situation in view of the passing of the order to which I have referred, the effect of which was that, as from the date of that order, employment at Vickers was denied to this man.

It was said that the judge ought to have regarded it as at an earlier date—namely, at a time when that order had not come into force, and when, therefore, the employment at Vickers was available to this man. It is not necessary to express any view on that point, because it arises only upon the footing that the work at Vickers was work which was suitable, and, therefore, work which the workman could properly be called upon to accept. As, in my view, the work was not suitable, that point does not arise, and, therefore, I express no opinion upon that. A

CLAUSON, L.J.: I agree. In the interests of brevity, I will only say this. In my judgment, the indication of opinion on the point at issue which appears in the last paragraph of the judgment of FLETCHER MOULTON, L.J., in *Eyre v. Houghton Main Colliery Co., Ltd.* (1) is a correct statement of the law. It seems to me to be correct, not only for the reasons indicated by FLETCHER MOULTON, L.J., but also for those indicated by SARGANT, J., when he dealt with the same point in *Jackson v. Hunslet Engine Co., Ltd.* (2). B C

GODDARD, L.J.: I agree. When listening to the attractive argument of counsel for the appellants, and the cases he cited, I thought it well to remind myself of what was recently said by LORD WRIGHT in the House of Lords in *Harris v. Associated Portland Cement Manufacturers, Ltd.* (5), at p. 89 ([1938] 4 All E.R., at p. 842): D

I am reluctant to repeat the warning so often reiterated in this House of the danger of superseding the words of the legislature by language used by judges in particular cases and with reference to the facts of the particular cases in order to explain how they arrived at the particular decisions. E

A little later on, LORD WRIGHT said, at p. 89 ([1938] 4 All E.R., at p. 842):

I venture to add that the tendency to disregard the words of the Act and substitute extracts from judgments is largely responsible for the accretion of thousands of cases round a legislative measure which was intended to be administered rather than litigated upon. F

The words we have to construe are :

... the average weekly amount which he is earning or is able to earn in some suitable employment or business after the accident.

I cannot help thinking that, if those words had to be construed by somebody who did not labour under the considerable disadvantage of having at his elbow a copy of the Workmen's Compensation Reports and the various textbooks on the subject, he would have no difficulty in saying that "suitable" meant "suitable," and that work which involved danger to the eyes was not suitable work for a one-eyed man. If there were authority which bound me to come to another decision, then, in spite of the passage which I have read from the opinion of LORD WRIGHT, I should have to do it, but I am happy to think that there is no such authority, and, as SIR WILFRID GREENE, M.R., has pointed out, the trend of authority is all the other way. G H

I think that this case is really quite clear. The county court judge has found—and, on the evidence, he was abundantly justified in finding—that the particular work which was offered to this man would have a tendency to be dangerous to eyesight, and would involve the risk of the man's losing an eye. If, therefore, the workman is a man starting on that work with only one eye, I cannot see myself that anyone can say that that work will be suitable for him. I agree that this appeal should be dismissed.

Appeal dismissed with costs. Conditional leave to appeal to the House of Lords.

Solicitors: *Carpenters* (for the appellants); *Bryan O'Connor & Co.* (for the respondent).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

GALBRAITH & McKENNA v. McKENNA & McKENNA.

[CHANCERY DIVISION (Simonds, J.), **November 5, 1940.**]

Emergency Legislation—Discovery in aid of execution—Examination as to means—Whether leave of court required before proceeding with examination—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1—R.S.C., Ord. 42, r. 32.

On June 5, 1935, the plaintiffs obtained judgment against the defendants for £600 with interest and costs. On July 19, 1935, an order was made under R.S.C., Ord. 42, r. 32, that the defendants be orally examined as to their means to satisfy the judgment. Two appointments were made, but the defendants did not attend. They subsequently left the jurisdiction, and it was not until Sept. 26, 1940, that, they having returned within the jurisdiction, an order was made for a further appointment under the order of July 19, 1935. The defendants then attended, and objected that the plaintiffs could not proceed further without obtaining the leave of the court under the Courts (Emergency Powers) Act, 1939:—

HELD: (i) the plaintiffs must obtain the leave of the court before proceeding further under R.S.C., Ord. 42, r. 32. The words in sect. 1 "to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court" must be construed as including any step which can be legitimately regarded as a step taken in the process of recovery of a judgment, whether it is a step which immediately or in the future affects the property of the debtor.

(ii) the fact that the original order for examination was made in 1935 before the passing of the Courts (Emergency Powers) Act, 1939, did not alter the position.

[EDITORIAL NOTE.] Although an examination of a debtor as to his means as discovery in aid of execution under R.S.C., Ord. 42, r. 32, is not a step which has the immediate result of affecting the debtor's property, it is here held that such a step must come within the words "to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court," and that, accordingly, leave of the court is required before the examination can take place. This is so even although, as in this case, the order for the examination was made before the passing of the Courts (Emergency Powers) Act, 1939. It would appear that the same principle applies to a *fi. fa.* issued before the passing of that Act.

AS TO DISCOVERY IN AID OF EXECUTION, see HALSBURY, Hailsham Edn., Vol. 14, pp. 149, 150, para. 231; and FOR CASES, see DIGEST, Vol. 21, pp. 674-676,

PROCEDURE SUMMONS to determine whether leave of the court under the Courts (Emergency Powers) Act, 1939, is necessary for an appointment for examination under R.S.C., Ord. 42, r. 32 in respect of a judgment dated July 19, 1935. The facts are fully set out in the judgment.

Harold Lightman for the plaintiffs.

H. V. Lloyd-Jones for the defendants.

SIMONDS, J. : This application raises a curious point, and it arises in this way. As long ago as June 5, 1935, the plaintiffs in this action recovered judgment against the defendants in the sum of £600 with interest at the rate of 6 per cent. from the date mentioned in the order, and, further, the defendants were ordered to pay the costs of the plaintiffs, which were taxed in the sum of £279.

On July 19, 1935, under the provisions of R.S.C., Ord. 42, r. 32, it was ordered that the defendants should attend and be orally examined as to whether any and what debts were owing to them, and whether they had any and what other property or means of satisfying the judgment, before one of the examiners of the court at such time and place as he might appoint. Two appointments were made under that order, but the defendants did not attend either of them. It became useless to make any further appointments, because, as I am told—and it is conceded at the bar—the judgment debtors left the jurisdiction of the court and did not return within it until a much later date, and it was not until Sept. 26, 1940, that, they having returned within the jurisdiction, an order was made for a further appointment under the order of July 19, 1935. At that appointment, they attended, and objection was then taken that, by virtue of the provisions of the Courts (Emergency Powers) Act, 1939, it was not competent for the judgment debtor to proceed further without obtaining leave of the court. That is the objection upon which I have to adjudicate.

R.S.C., Ord. 42, is the order which deals with execution. Rule 32 is the first rule under the subheading "Discovery in aid of execution," and it provides as follows :

When a judgment or order is for the recovery or payment of money, the party entitled to enforce it may apply to the court or a judge for an order that the debtor liable under such judgment or order, or in the case of a corporation that any officer thereof, be orally examined, as to whether any and what debts are owing to the debtor, and whether the debtor has any and what other property or means of satisfying the judgment or order, before a judge or an officer of the court as the court or judge shall appoint ; and the court or judge may make an order for the attendance and the examination of such debtor, or of any other person, and for the production of any books or documents.

I need not point out that that is a jurisdiction which, although freely exercised, is one which bears hardly upon the judgment debtor, submitting him to a searching cross-examination as to his property and means, and it is, as it is described, an order which is made in aid of execution.

I turn, then, to the provisions of the Courts (Emergency Powers) Act, 1939. Sect. 1 provides as follows :

(1) Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court, to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court (whether given or made before or after the commencement of this Act) for the payment or recovery of a sum of money . . .

Those words are of the widest possible scope. I cannot construe the words "to proceed to execution on, or otherwise to the enforcement of, any judgment or order of any court" as meaning anything less than "take any step in the direction of the execution or enforcement of the order." In my opinion, it includes any step, whether that step will have the immediate result of affecting the property of the judgment debtor or will be a step in aid of taking such further step. It is any step which can legitimately be regarded as one taken in the process of recovery of a judgment, and taken with a view to enforcing the judgment. Accordingly, it appears to me that I must regard a step which is taken under R.S.C., Ord. 42, r. 32, as being such a step as cannot be taken without the leave of the court under the Courts (Emergency Powers) Act, 1939.

However, it is said then by the judgment creditor: "Here what is proposed to be done is nothing more than taking an appointment under an order already made—and made, indeed, as long ago as 1935—which would have been been taken long since, but for the fact that the judgment debtor has evaded the jurisdiction." I do not think that I can take that view of the section. It appears to me that, where an order of the court has been made, but has not been complied with for any reason, good or bad, the person entitled to the benefit of the order is not entitled to proceed upon it if it be a step in the enforcement of his judgment unless he gets the leave of the court. I have inquired what the course of practice has been where, for instance, a writ of *fi. fa.* had been issued, but not acted upon before the Courts (Emergency Powers) Act, 1939, came into operation. Upon that I have been unable to get any assistance at the bar, and nobody has that information. However that may be, though, it appears to me that, in a case of this kind, where an order has been made, but has not been complied with, if the nature of that order is such that it is a step towards the enforcement of a judgment, then it should not be proceeded with until the necessary leave has been obtained. Accordingly, I must give effect to this objection, but I think that, in all the circumstances of the case, the costs of the application should be reserved, and should be dealt with if and when the leave of the court is sought under the Courts (Emergency Powers) Act, 1939.

Application granted. Costs reserved.

Solicitors: *Harold Eves* (for the plaintiffs); *Boxall & Boxall* (for the defendants).

Re WOOD.

[CHANCERY DIVISION (Morton, J.), November 12, 1940.]

Emergency Legislation—Company—Debenture—Appointment of receiver with leave of court—Subsequent application by receiver for leave to sell—Whether second application necessary—Courts (Emergency Powers) Act, 1939 (c. 67), s. 1 (2). A

Where a debentureholder has appointed a receiver with leave of the court under the Courts (Emergency Powers) Act, 1939, s. 1 (2) (ii), and the receiver is, by the debenture, stated to be deemed to be the agent of the company issuing the debenture, no further leave of the court is required before the receiver can sell the property subject to the charge created by the debenture. B

Re S. Brown & Son (General Warehousemen), Ltd. (1) considered.

[EDITORIAL NOTE. Doubt has been expressed as to the expediency of allowing a receiver to realise property subject to a charge created by a debenture without a further application for leave, but it is pointed out that the court, when giving leave for the appointment of a receiver, is entitled, under the Courts (Emergency Powers) Act, 1939, s. 1 (4), to give leave subject to such restrictions and conditions as it thinks proper. This provision enables the court, when granting leave to appoint a receiver, to insert a restriction which would ensure that the receiver would have to come back to the court before selling, and provides an adequate safeguard for the company. C

AS TO POSITION OF RECEIVER OF COMPANY, see HALSBURY, Hailsham Edn., Vol. 5, pp. 515, 516, para. 835; and FOR CASES, see DIGEST, Vol. 10, pp. 792, 793, Nos. 4974-4980.] D

Cases referred to:

- (1) *Re Brown (S.) & Son (General Warehousemen), Ltd.*, [1940] 3 All E.R. 638; Digest Supp.
- (2) *Gosling v. Gaskell*, [1897] A.C. 575; 10 Digest 792, 4975; 66 L.J.Q.B. 848; 77 L.T. 314; *revsg.*, [1896] 1 Q.B. 669. E
- (3) *Re Trade Distributors, Ltd.* (1940), Mar. 11, Unreported.

PROCEDURE SUMMONS for leave under the Courts (Emergency Powers) Act, 1939, to sell property comprised in a debenture.* The facts are fully stated in the judgment. F

E. M. Winterbotham for the applicant.

The respondents did not appear and were not represented.

MORTON, J.: This summons raises a question of great importance under the Courts (Emergency Powers) Act, 1939, and the question may be stated as follows. Where a debentureholder has appointed a receiver (leave so to appoint a receiver having first been obtained under the Courts (Emergency Powers) Act, 1939, s. 1 (2) (ii)), and the company issuing the debenture is not in liquidation, is any further leave of the court required before the receiver can sell the property which is subject to the charge created by the debenture? G H

The facts of this particular case are as follows. On Nov. 18, 1938, the company, the Globe Clothing Club, Ltd., issued a debenture in favour of one Robert Dobson to secure the sum of £1,200 and interest at the rate of 6 per cent. per annum, and a premium of £1 per week.

The principal sum was repayable on Jan. 1, 1939, and was not repaid on that date. Clauses 3, 4 and 11 of the debenture are in the following terms :

- A 3. The company hereby charges with such payments its undertaking and all its property and assets both present and future including its uncalled capital for the time being. 4. This debenture is issued subject to and with the benefit of the conditions indorsed hereon, which shall be deemed incorporated herewith. 11. The holder of this debenture may at any time after the principal moneys secured by this debenture shall have become payable by any writing under his hand appoint a receiver of the undertaking, property and assets hereby charged (with power for such receiver, in addition to exercising the powers conferred by the sections of the Law of Property Act, 1925, hereinafter mentioned, to manage and carry on the business of the company, to take possession of, get in and collect the property and assets hereby charged, and to sell, convert into money and realise the same, and to convey the property sold in the name and on behalf of the company for which purpose the company hereby irrevocably appoints every such receiver its attorney) and may at any time in like manner remove a receiver so appointed and appoint another in his place with like powers. Any receiver so appointed shall so far as the law allows be deemed to be the agent of the company for all purposes and the holder of this debenture shall not be under any liability for his remuneration or otherwise.
- B
- C All moneys received by any such receiver shall after providing for the matters specified in the first three paragraphs of the Law of Property Act, 1925, s. 109 (8), and subject to the provisions of that Act as to the application of insurance money, be applied in or towards satisfaction of the principal moneys and interest secured by this debenture and subject as aforesaid be held in trust for the company. The foregoing provisions shall take effect by way of variation and extension of sects. 101, 104-109, inclusive, of the said Act, and the provisions of those sections and the powers conferred on a mortgagee or receiver by those sections, as so varied and extended, shall apply to and be exercisable by any such receiver so far as applicable.
- D

- It is to be observed that, if and when the holder of the debenture duly appoints a receiver by writing under his hand, that receiver shall, so far as the law allows, be deemed to be the agent of the company for all purposes. On December 9, 1939, Dobson, who still held this debenture, applied under the Courts (Emergency Powers) Act, 1939, for leave to exercise any remedy which might be available to him by way of the appointment of a receiver of the property comprised in the debenture, and on Dec. 21, 1939, Master NEWMAN made an order that the applicant be at liberty to exercise any remedy which might be available to him by way of the appointment of a receiver of the property comprised in the debenture. On Dec. 22, 1939, Dobson appointed the applicant on the present summons, Benjamin Wood, to be receiver of the property comprised in the debenture. On Oct. 10, 1940, Wood applied by summons for leave to proceed to exercise the rights and powers given to a receiver under the terms of the debenture to sell, convert into money, realise and convey the property and assets the subject of the debenture. The company was made a respondent to that summons, but does not appear, and there is evidence in para. 6 of the affidavit of Wood, sworn on Oct. 30, 1940, and filed on Nov. 4, 1940, that the respondent company is not in liquidation.
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The Courts (Emergency Powers) Act, 1939, s. 1 (2), so far as material, provides as follows :

Subject to the provisions of this section, a person shall not be entitled, except with the leave of the appropriate court : (a) to proceed to exercise any remedy which is available to him by way of . . . (iv) the realisation of any security . . .

I have to determine in effect whether a sale by the receiver in the present case of the property comprised in the debenture comes within the provision which I have just read, and accordingly is an act which can only be done with the leave of the court.

In *Re Brown (S.) & Son (General Warehousemen), Ltd.* (1), BENNETT, J., had to consider a case which resembles the present case in every respect except one—namely, that in that case the company had gone into liquidation after the receivers and managers had been appointed by the debentureholder with the leave of the court. BENNETT, J., said, at p. 638 :

This is a summons under the Courts (Emergency Powers) Act, 1939, asking for leave that the receivers and managers, C. Sherrott and W. H. Cork, should be allowed to sell the property comprised in the debentures. Clause 11 of the debentures provides for the appointment of a receiver under hand after the principal moneys become payable. . . .

Then the judge quoted the powers conferred on the receiver by the debenture in question, and those powers, I think, so far as they are quoted, are identical with the powers contained in the debenture before me, and include the provision :

. . . any receiver so appointed shall so far as the law allows be deemed to be the agent of the company for all purposes.

That provision is identical with the provision in the debenture before me. The judge then continued as follows, at p. 639 :

Since the order of Feb. 27, 1940, giving leave to appoint a receiver was made, the company has gone into voluntary liquidation, and, according to *Gosling v. Gaskell* (2), the result of that is to terminate the agency between the receivers and managers on the one hand, and the company on the other. The question now arises, therefore, whether the receivers and managers when they wish to sell, should obtain the leave of the court under the Courts (Emergency Powers) Act, 1939. The answer to that question depends upon the meaning of sect. 1 (2) of the Act, having regard to the particular facts of the case.

The judge then read the provisions which I have just read from sect. 1 (2) of the Act, and continued as follows, at p. 639 :

In the present case, if the company had not gone into liquidation, and if the receivers and managers still remained the agents of the company, it might have been difficult to say that the receivers and managers acting as the company's agents and seeking to exercise the powers contained in cl. 11 of the debentures, were proceeding to exercise any remedy available to the debentureholders within the meaning of the Act.

That is precisely the point which I now have to consider, and, of course, I am assisted by the observations of BENNETT, J., which I have just quoted. He continued as follows, at p. 639 :

In the present case, however, the position is entirely different. As the result of the liquidation, the receivers and managers have ceased to be the agents of the company, and are acting in co-operation with the debentureholders by whom they were appointed. If the receivers desire to realise the property, in these circumstances, they would be acting as agents of the debentureholders, and their act in realising it would be, not their act, but that of the debentureholders. In such circumstances it would be necessary for leave of the court to be obtained at the instance of the debentureholders, whose agents the receivers and managers must be presumed to be.

It may be that in *Re Brown (S.) & Son (General Warehousemen), Ltd.* (1)

there were some special facts which led BENNETT, J., to the conclusion that the receivers had become the agents of the debentureholders, but, if by that passage the judge is intimating that in his view the mere fact of the liquidation not only terminates the agency of the receiver *quoad* the company, but also constitutes the receivers the agents of the debentureholder, that is a matter which I should desire to consider very carefully before expressing my assent to it. At the moment, I feel doubt as to whether it is borne out by *Gosling v. Gaskell* (2). However, I do not have to arrive at any conclusion upon that point, as, in the case before me, the company is not in liquidation.

A In selling the property comprised in the debenture, is the receiver proceeding to exercise any remedy which is available to him by way of the realisation of a security? In my view, the receiver personally is clearly not doing any such thing, if these words are to be given their ordinary meaning. The receiver is deemed to be the agent of the company, and he desires to sell this property, as I see the matter, in his capacity as such agent. It is equally clear, of course, that the company is not proceeding to exercise any remedy available to it by way of the realisation of a security, and it seems to me that, if anyone in the present case comes within the words of the section, it must be the debentureholder. Is the debentureholder proceeding to exercise any remedy which is available to him by way of the realisation of a security? The debentureholder is not before the court at all, and, if he were so proceeding, it would be necessary for him to apply for leave to the appropriate court. However, I have arrived at the conclusion that these words do not fit the case of the debentureholder, by reason of the fact that, under the conditions of the debenture, once the receiver is appointed, then, so far as the law allows, he is to be deemed the agent of the company for all purposes. Thus, it is the company's agent who desires to sell this property, and, if he does sell, it seems to me that, within the terms of the Act, the debentureholder is not proceeding to exercise a remedy which is available to him by way of realisation of any security. I realise that this is a position which may have been intended to have been provided for by the Act, and I realise also that it has the result that, once the debentureholder has obtained the leave of the court to appoint a receiver, the security may be realised without any further leave of the court, but that is the conclusion to which I am driven by the words of the Act in the circumstances of this case—circumstances which no doubt have occurred in the past, and which no doubt will occur again in the future.

H I may add that, although this point has never come directly before me for decision on any previous occasion, and has never, as far as I am aware, come before any of my brethren, I have on occasions felt some doubt as to whether the appointment of a receiver in these circumstances by the debentureholder might not have the result which I have just held that in fact it has. It has accordingly been my practice,

if I have thought the case was one in which leave should be given, to give leave for the appointment of a receiver, but, if I felt doubt as to whether or not the receiver ought to be allowed to realise the property without further application to the court, to insert a restriction which would ensure that the receiver would have to come back to the court before selling. This the court has power to do under sect. 1 (4) of the Act, and the master in the present case has referred me to an order which I made on Mar. 11, 1940, in *Re Trade Distributors, Ltd.* (3). In that case, I ordered that the applicants should be at liberty to proceed to exercise any remedy which might be available to them by way of appointing a receiver of the property comprised in the debenture which they held, but I directed the following words to be added :

But so that the receiver is not to be at liberty to realise the security created by or subject to the said debenture without the leave of the judge in person, for which purpose the applicants are to be at liberty to apply.

It seems to me that, even if, as a result of my decision, there would appear to be a gap in the Act, the gap can be filled, in any case in which the judge to whom the application is made thinks proper, by coupling with the leave to appoint a receiver some such restriction as that which I have just read. The result is that, in my view, the present application was not in fact necessary, although I do not doubt that it has served a very useful purpose. The application is dismissed, with the expression of my opinion that, in the circumstances, no leave is necessary. The respondent has not appeared, but, if he has incurred any costs, the applicant should pay them.

Application dismissed.

Solicitors : *Austin J. Wright*, agent for *Herbert Duxbury*, Bradford (for the applicant).

[Reported by IRENE G. R. MOSES, *Barrister-at-Law.*]

Re MACKENZIE, MACKENZIE *v.* ATTORNEY-GENERAL.

[CHANCERY DIVISION (Morton, J.), **November 6, 7, 1940.**]

Estate Duty—Property of lunatic—Foreign property—Proceeds of sale of land in New South Wales—Proceeds invested in War Loan—"Ordinarily resident in the United Kingdom"—Lunacy Act, 1890 (c. 5), s. 123—Finance (No. 2) Act, 1915 (c. 89), s. 47.

The deceased, who was born in Australia, came to England on a visit in May, 1885. While she was in England, she became of unsound mind, and was admitted to a lunatic asylum in Sept., 1885. She remained there until her death on Jan. 26, 1939. In 1924, pursuant to the Lunacy Act, 1890, s. 120, the court authorised the sale of certain land in New South Wales, and ordered the proceeds to be remitted to England and lodged in court. This money was invested in 5 per cent. war stock 1929/1947, and was now represented by 3½ per cent. war stock. It had to be determined (i) whether, on the true construction of the Lunacy Act, 1890, s. 123, and the Finance Act, 1894, s. 2, this war stock was situate out of the United Kingdom, and (ii) whether

the deceased was ordinarily resident in the United Kingdom for the purpose of the Finance (No. 2) Act, 1915, s. 47. On the first question, it was contended that, since by the Lunacy Act, 1890, s. 123, the property devolved upon persons who would have been entitled to this land in New South Wales if the land had not been sold, and the surplus moneys were to be of the same nature as the property sold, the property must be considered as situate out of the United Kingdom. On the second question, it was contended that the deceased merely came to the United Kingdom on a visit, and was not, therefore, ordinarily resident there at the time when she became insane, and that the time she spent in the United Kingdom thereafter until her death was of no importance for this purpose, as it was against her will:—

HELD: (i) the property was not situate out of the United Kingdom. There was nothing in sect. 123 which would notionally transpose the property, and, in the absence of clear words to that effect, the property, being in the United Kingdom at the date of the death of the deceased, was situate in the United Kingdom for the purposes of estate duty.

(ii) the question of residence is not necessarily a question of choice, and, in the circumstances, the deceased at the time of her death was ordinarily resident in the United Kingdom.

[EDITORIAL NOTE.] It is said that the first point in this case has not been the subject of previous decision. The second point is of more interest, where it is decided that residence is not dependent upon intention and a person may be ordinarily resident in a country though not in a position to alter that residence of his own free will. If he has no place of residence in a country other than that in which he is physically resident, it would seem that he is ordinarily resident in that country.

AS TO ESTATE DUTY ON FOREIGN PROPERTY, see HALSBURY, Hailsham Edn., Vol. 13, pp. 246-248, paras. 237, 238; and FOR CASES, see DIGEST, Vol. 21, p. 17, Nos. 89-96.]

Cases referred to:

- (1) *A.-G. v. Ailesbury (Marquis)* (1887), 12 App. Cas. 672; 21 Digest 118, 894; 57 L.J.Q.B. 83; 58 L.T. 192.
- (2) *Forbes v. Steven, Mackenzie v. Forbes* (1870), L.R. 10 Eq. 178; 21 Digest 57, 375; 39 L.J.Ch. 485; 22 L.T. 703.
- (3) *Levene v. Inland Revenue Comrs.*, [1928] A.C. 217; Digest Supp.; 97 L.J.K.B. 377; 139 L.T. 1; 13 Tax Cas. 486.
- (4) *Inland Revenue Comrs. v. Lysaght*, [1928] A.C. 234; Digest Supp.; 97 L.J.K.B. 385; 139 L.T. 6; 13 Tax Cas. 511.
- (5) *Re Erskine, Ex p. Erskine* (1893), 10 T.L.R. 32; 4 Digest 27, 209.

SUMMONS to determine the liability of the estate of the deceased to estate duty. The summons and the facts are fully set out in the judgment.

W. P. Spens, K.C., and *Lindsay H. Jopling* (for *R. O. Wilberforce* on war service) for the plaintiff.

J. H. Stamp for the defendant.

Spens, K.C.: On the second question on the summons, the question is whether the deceased, who became of unsound mind in 1885 whilst she was on a visit to this country, and who was detained in England as a patient in a lunatic asylum till her death in 1939, was ordinarily resident in England for the purposes of the Finance (No. 2) Act, 1915, s. 47. [Counsel referred to GREEN ON DEATH DUTIES, p. 496.] In *Inland Revenue Commissioners v. Lysaght* (4), VISCOUNT SUMNER said, at p. 243: "I think the converse to 'ordinarily' is 'extraordinarily'"

and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not 'extraordinary.'"

Jopling : Once there is a constraint, the time factor is irrelevant. If the deceased had died in 1886, no one would have said that she was ordinarily resident in the United Kingdom. It is admitted in the evidence that the mother arrived with her two daughters from Australia in May, 1885, and in Sept., 1885, the deceased was admitted to an asylum. The mother, who gave various addresses, was travelling and had no fixed home. There is authority that a person may be ordinarily nowhere—for instance, a prisoner of war, however long he was kept here, would not be ordinarily resident here, and, if he should die during that term, no one would say that he was ordinarily resident here, and the same principle is applicable whether the term of imprisonment is of short or of long duration. There is a difference if a person is ordinarily resident here at the time of incarceration. A B

Stamp : There is no authority for the statement that a person need not be ordinarily resident anywhere. In the case of a tramp who goes through the countryside from place to place, he is, nevertheless, ordinarily resident in England. The question of ordinary residence is a question of fact for the commissioners. The deceased arrived in England in May, 1885. There is no evidence that she or her mother ever intended to return to Australia. It is not a case of extraordinary restraint. It is simply a question of physical fact as to where the deceased actually resided. In the case of a prisoner of war, there is an element of restraint, and, if it were removed, the prisoner would return to his home. The opinion of LORD SUMNER in *Inland Revenue Comrs. v. Lysaght* (4) must be regarded in the light of the facts of that case. There a man came to England regularly, but only for short periods for the purposes of business, his home being in Ireland. In the present case, the deceased had no other residence. [Counsel referred to *Levene v. Inland Revenue Commissioners* (3).] C D E F

Spens, in reply : The difference in this case is between resident and ordinarily resident. It cannot be said that the deceased or her mother were ordinarily resident in England at the material time—namely, when the deceased was admitted as a patient to a lunatic asylum. G

MORTON, J. : This summons raises a short but interesting point upon the true construction of the Lunacy Act, 1890, s. 123, and the Finance Act, 1894, s. 2. I am told that it is a point which has not yet formed the subject of any decision. The first question asked by the summons is as follows : H

Whether upon the true construction of the Lunacy Act, 1890, s. 123, and the Finance Act, 1894, s. 2, the sum of £16,451 17s. 9d. 3½ per cent. war stock which represented the proceeds of sale of an undivided share of real estate in New South Wales, Australia, sold pursuant to the order of this honourable court made under the Lunacy Act, 1890, s. 120, was situate out of the United Kingdom for the purposes of liability to estate duty.

The facts in regard to this sale are these. In 1924, when the owner of a half-share in the property, Helen Tessie Flexman Mackenzie, was a person of unsound mind not so found, the court by an order of Oct. 13, 1924, authorised the person who was then receiver to concur in the sale of this property in New South Wales :

A . . . and it was ordered that the proceeds of the said sale were to be remitted to England and lodged in court to an account entitled "Helen Tessie Flexman Mackenzie, spinster, a person of unsound mind not so found by inquisition, proceeds of sale of realty in New South Wales" and it was further ordered that the said proceeds should be invested in war stock 5 per cent. 1929/1947.

B That war stock is now represented by $3\frac{1}{2}$ per cent. war stock. The receiver in question died on Jan. 12, 1925, before the sale had been effected, and an order was made under the Lunacy Act, 1890, by the High Court of Justice on Feb. 5, 1925. A fresh receiver was appointed, and the receiver so appointed was authorised to concur in the sale of the property :

C . . . and it was ordered that the proceeds of the said sale were to be remitted to England and lodged in court to an account entitled "Helen Tessie Flexman Mackenzie, spinster, O.1209, proceeds of sale of realty in New South Wales" and it was further ordered that the said proceeds should be invested in war stock 5 per cent. 1929/1947.

D Miss Mackenzie remained a person of unsound mind until the date of her death. The sale was made under the Lunacy Act, 1890, ss. 110, 120. Sect. 110 provides as follows :

The powers and authorities given by this Act to the judge in lunacy shall extend to property within any British possession.

Sect. 120 provides as follows :

E The judge may, by order, authorise and direct the committee of the estate of a lunatic to do all or any of the following things : (a) sell any property belonging to the lunatic . . .

Sect. 123 provides as follows :

F (1) The lunatic, his heirs, executors, administrators, next of kin, devisees, legatees, and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of.

G I have already held that Miss Mackenzie was domiciled in Victoria Australia, at the time of her death, and that the stock devolved upon the persons who would have been entitled to this land in New South Wales, if the land had not been sold.

H The question which I have to determine is whether this sum of $3\frac{1}{2}$ per cent. war stock is property situate out of the United Kingdom within the meaning of the Finance Act, 1894, s. 2 (2). There is no question that the investment in question comes within the Finance Act, 1894, s. 2 (1), being property of which the deceased was, at the time of her death, competent to dispose. That is to say, it is property which passed by the death of the deceased. The question I have to determine is whether that property is situate out of the United Kingdom. Counsel for the plaintiff

relies upon the provisions of the Lunacy Act, 1890, s. 123 (1), and he has also referred me to the somewhat contrasted language of sect. 123 (2). He says that the effect of that section is that I must treat this property, for fiscal purposes, as if it were land situate in New South Wales, and he relies in particular upon the concluding words of subsect. (1):

... and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of. A

I must start with the fact that the property in question was in this country at the date of the intestate's death, and I have arrived at the conclusion that I cannot find that the Lunacy Act, 1890, s. 123, gives the property any situation other than that which it in fact has. Counsel B for the defendant has pointed out that there were, in fact, two transactions carried out here by the court—namely, (i) the sale of the land in New South Wales, and (ii) a direction that the money should be brought to this country, lodged in court, and invested. He points out further that the court might have thought fit to allow the money to remain in New C South Wales, and he suggests that, if it had been allowed to remain there, it would have been subject to Australian duties, and not to British duties. I think that there is great force in that contention. I cannot find sufficient grounds in the Lunacy Act, 1890, s. 123 (1), for transporting the position of the property notionally to New South Wales. I think that D that section is directed to providing for the beneficial devolution of the property, and that it does not have the operation for which counsel for the plaintiff contends. The property being situate in this country, I should have required to find in some other Act clear words transposing notionally its position before I held that it escaped the taxation E which is levied by the Finance Act, 1894, s. 2.

Counsel for the plaintiff has referred me to the opinion of LORD MACNAGHTEN in *A.-G. v. Ailesbury (Marquis)* (1), and also to the judgment of SIR W. M. JAMES, V.-C., in *Forbes v. Steven* (2). In my view, the principles there laid down do not enable me in the present case to give a F local or notional situation to the property other than which it in fact possesses. I think that the matter really turns upon the construction of the Lunacy Act, 1890, s. 123, and I cannot give it the far-reaching effect for which counsel for the plaintiff contends.

The other question which I have to decide is whether, in the events G which have happened, the intestate, Helen Tessie Flexman Mackenzie, deceased, was ordinarily resident in the United Kingdom for the purposes of the Finance (No. 2) Act, 1915, s. 47. The way in which the question arises is this. Sect. 47 provides as follows:

The Treasury may, if they think fit, during the continuance of the present war and a period of 12 months thereafter, issue any securities which they have power to issue for the purpose of raising any money or any loan with a condition that neither the capital nor the interest thereof shall be liable to any taxation, present or future, so long as it is shown in manner directed by the Treasury that the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom, and securities issued with such a condition shall be exempt accordingly. H

The security in question in the present case is £16,451 17s. 9d. 3½ per cent. War Stock, and it is common ground that this investment will attract duty if Miss Mackenzie was either domiciled or ordinarily resident in the United Kingdom. I have already held that she was domiciled, not in the United Kingdom, but in Victoria, Australia, and I now have to decide whether she was ordinarily resident in the United Kingdom. I have not found it at all an easy question on which to arrive at a conclusion. I start with the fact that, as was said by LORD WARRINGTON OF CLYFFE in *Levene v. Inland Revenue Comrs.* (3), at p. 232, the word "resident" has no technical or special meaning for the purposes of the Income Tax Act. He said, at p. 232 :

"Ordinarily resident" also seems to me to have no such technical or special meaning.

I think these words must apply equally to the section which is relevant in the present case.

The facts in regard to Miss Mackenzie, which I have already stated in part, are these. She was born at Maldon, Victoria, Australia, on Nov. 12, 1857. Her father, Robert Cleghorn Mackenzie, a gentleman who resided there, became a magistrate there. He died on May 19, 1866, at Maldon. Para. 6 of the affidavit of the plaintiff is as follows :

Some time after the death of the said Robert Cleghorn Mackenzie the said Maria Ellen Mackenzie left Australia and lived with her said two daughters in France and Switzerland, occasionally visiting England.

Maria Ellen Mackenzie was Miss Mackenzie's mother. It is suggested that there may be some doubt whether Mrs. Mackenzie lived in France and Switzerland before the visit to England, to which I shall now refer, or whether it was after the visit to England that she lived there, but I do not think that that is of any great weight for the purposes of this case. Then the affidavit proceeds as follows :

In the year 1885, when the said Helen Tessie Flexman Mackenzie was in England with her mother, she was certified as of unsound mind and remained at the Holloway Mental Hospital until Nov., 1893, when she was removed to the Coppice Lunatic Hospital at Nottingham. She remained a patient at the last-named hospital until her death and did not recover.

Mrs. Maria Ellen Mackenzie, the mother of the intestate, died on Aug. 16, 1911, and the intestate herself died on Jan. 26, 1939. Some further evidence is given in an affidavit of one Blatch. He says, in para. 2 :

Maria Ellen Mackenzie, the mother of the deceased Helen Tessie Flexman Mackenzie, travelled from Australia to London with her two daughters (including the said Helen Tessie Flexman Mackenzie) in the early part of the year 1885, arriving at the Albert Docks on May 19, 1885. This appears from an entry in the diary of William Ord Mackenzie (the father of the plaintiff and brother of Robert Cleghorn Mackenzie) in the following words under date May 19, 1885 : "To Albert Docks to meet Nellie and girls on arrival from Australia."

Para. 3 is as follows :

The deceased was admitted to Holloway Sanatorium, St. Ann's Heath, Virginia Water, as a certified patient on Sept. 23, 1885, and on that occasion her mother gave her address as 10, Devonshire Hill, Hampstead. [It is suggested that that ought to be Downshire Hill, Hampstead.] These facts appear from records in the possession of the Board of Control constituted by the Mental Deficiency Act,

1913, s. 22. The records contain nothing to show whether the address was, or was not, a temporary one. According to the same records, the illness of the deceased had lasted about 15 months prior to certification.

If that is so, it would appear that the deceased was ill when this voyage to England took place. Paras. 4 and 5 are as follows :

4. The next reference to the mother of the deceased in the records of the Board of Control, is in Oct., 1893, when she made a request that the deceased should be removed to the Coppice, Nottingham, and this was done. On this occasion, Mrs. Mackenzie gave as her address, the General Post Office, Leamington, Warwickshire, which she stated to be "for a few months only." 5. On three subsequent occasions, viz., in 1897, 1901 and 1907 respectively, Mrs. Mackenzie gave addresses in France and Italy, and she appears to have been ordinarily resident abroad over the period including those years.

At first sight, it might seem strange if the court were to hold that a lady who spent the last 54 years of her life continuously in this country was not ordinarily resident in the United Kingdom, but counsel for the plaintiff suggest that Miss Mackenzie could not be said to be ordinarily resident in Sept., 1885, when she was certified as of unsound mind, and that during the whole of the rest of her life she was under constraint and unable to exercise any will of her own, and that that period, the last 54 years of her life, cannot be taken into account at all as making her ordinarily resident in this country. They put the case of a prisoner of war who has come to this country and has been detained here, it might be, for a year. They say that he would not be ordinarily resident, because the element of constraint is present. They take again the case of a foreigner with a home abroad, who comes to this country on a visit and commits some crime or offence against the laws of the country, and is imprisoned for a considerable time, and ultimately dies in this country. There, they say, he would not be held to be ordinarily resident, and they say that the same reasoning ought to apply to the case of Miss Mackenzie. They further rely upon certain observations of VISCOUNT SUMNER and LORD BUCKMASTER in *Inland Revenue Comrs. v. Lysaght* (4), at pp. 243, 248. VISCOUNT SUMNER said, at p. 243 :

My Lords, the word "ordinarily" may be taken first. The Act on the one hand does not say "usually" or "most of the time" or "exclusively" or "principally" nor does it say on the other hand "occasionally" or "exceptionally" or "now and then," though in various sections it applies to the word "resident," with a full sense of choice, adverbs like "temporarily" and "actually." I think the converse to "ordinarily" is "extraordinarily" and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not "extraordinary."

Then he goes on to the facts of the case. It is submitted for the plaintiff that the words of VISCOUNT SUMNER "adopted voluntarily" indicate that no residence can be treated as ordinary residence unless it is the result of a voluntary act on the part of the person residing there. That the matter does not wholly depend upon choice is made clear, I think, by the opinion of LORD BUCKMASTER, at p. 248 :

It could not, I think, be denied that, even although the respondent had his home in Ireland, his sojourn in this country in the circumstances and for the purposes found by the commissioners might be so prolonged as to place his residence here beyond dispute, but none the less I understand the judgment of the Court of Appeal to mean this, that they regard the object of his visits sufficient to show that he

could not be regarded as resident. They state that it was not of his own free choice but in obedience to the necessities of his position in relation to the company of John Lysaght, Ltd., that he was over here, from which it would appear that the element of choice is regarded by the Court of Appeal as a factor of great, if not of final, consequence in determining residence. In my opinion this reasoning is not sound. A man might well be compelled to reside here completely against his will; the exigencies of business often forbid the choice of residence, and though a man may make his home elsewhere and stay in this country only because business compels him, yet none the less, if the periods for which and the conditions under which he stays are such that they may be regarded as constituting residence, as in my opinion they were in this case, it is open to the commissioners to find that in fact he does so reside, and if residence be once established ordinarily resident means in my opinion no more than that the residence is not casual and uncertain but that the person held to reside does so in the ordinary course of his life.

- A
- B Although I felt some force in the argument of counsel for the plaintiff, I do not think that I can accede to it on the facts of the present case. When this lady was 28 years old, she came over to England with her mother, so far as we know, on a visit. There is no evidence as to how long they meant to stay. The evidence rather suggests, though it does not
- C conclusively prove, that at that time the mother and daughters had been travelling to some extent since the father's death, and I do not know whether or not they still had a residence at Maldon, Victoria. So far as the evidence shows, it would appear that the mother did not go back to reside in Australia, but spent some time in France and in Italy,
- D and some time in England, but there again the evidence is not conclusive.

- E What happened was this. Miss Mackenzie, having stayed some 4 months in England, remained there as long as she lived. Her residence in England became permanent, no doubt, by reason of her mental condition and the fact that she required care and attention, but I think that it may be fairly said that, in the ordinary course of her life as events happened, she resided in England. I think that one thing at least is clear. If, in the circumstances which I have described, Miss Mackenzie was not ordinarily resident in England during the last 54 years
- F of her life, she was not ordinarily resident anywhere else. I inquired of counsel whether there had ever been any decision as to whether a man or a woman could be ordinarily resident nowhere within the meaning of the Act which I have to construe, a finance Act, but I understand that there has been no such decision.

- G Taking into account the whole of the circumstances of this case, I think that I must arrive at the conclusion that Miss Mackenzie was ordinarily resident in England. I do not understand VISCOUNT SUMNER, in the passage which I have quoted from *Inland Revenue Comrs. v. Lysaght* (4), as saying that a period of residence in this country which is
- H involuntary must be wholly disregarded for the purpose of ascertaining whether or not a person is ordinarily resident, and it must not be left out of account that Miss Mackenzie came to this country, one presumes, voluntarily at the age of 28, and, as a result of the circumstances which I have described, never left it. Whether or not I could have held that Miss Mackenzie was ordinarily resident in this country immediately

before she was taken to the Holloway Sanatorium at Virginia Water I am not sure. In the light of *Re Erskine, Ex p. Erskine* (5), to which counsel for the plaintiff referred, there might have been considerable doubt on that matter, but, having regard to the whole course of events, I think that Miss Mackenzie was ordinarily resident in this country before her death. In *Levene v. Inland Revenue Comrs.* (3), VISCOUNT CAVE, L.C., A said, at p. 225 :

It remains to be considered whether during the period in question the appellant "ordinarily resided" in the United Kingdom for the purposes of s. 46 of the Act [an income tax case], and I think that there was material upon which the commissioners could answer this question in the affirmative. The suggestion that in order to determine whether a man ordinarily resides in this country you must count the days which he spends here and those which he spends elsewhere, and that it is only if in any year the former are more numerous than the latter that he can be held to be ordinarily resident here, appears to me to be without substance. The expression "ordinary residence" is found in the Income Tax Act of 1806 and occurs again and again in the later Income Tax Acts, where it is contrasted with usual or occasional or temporary residence; and I think that it connotes residence in a place with some degree of continuity and apart from accidental or temporary absences. B C

There can be no doubt that there was a very great degree of continuity in the present case.

With regard to the cases, put by counsel for the plaintiff, of the prisoner of war, or the prisoner incarcerated for some offence, such cases must be dealt with on their particular facts, if and when they arise, but I can well imagine, in the case of a prisoner of war, that, if a man had a permanent residence in Germany and came over here in an aeroplane to attack this country, and was captured and kept here for a considerable period, it might well be held that his ordinary residence was his home in Germany. However, as I have said, I do not propose to express any view upon hypothetical cases. Taking the case which is before me, I have arrived at the conclusion that the Crown's contention succeeds. D E

Summons answered in the affirmative. Costs as between party and party to be paid by the plaintiff out of a particular fund. F

Solicitors : *Leman, Chapman & Harrison* (for the plaintiff); *Solicitor of Inland Revenue* (for the defendant).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

COLE v. UNITED DAIRIES, LTD. G

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and du Pareq, L.JJ.), November 5, 1940.]

Workmen's Compensation—Declaration of liability—No present incapacity—Incapacity due to disfigurement—No physical inability to do the work. H

On Nov. 26, 1938, the appellant, while in the employ of the respondents as a milk roundsman, met with an accident which resulted in his right ear being cut off. He was paid full compensation until May 1, 1939, when the respondents took him back into their employment in another capacity at a reduced remuneration. His compensation payments were then reduced to 5s. per week and paid until Sept.,

1939. On June 30, 1940, he entered the Army, and in these proceedings asked for a declaration of liability, though no claim for compensation was made for the time being. The applicant had stated in evidence that a manager employed by the respondents had said that he did not think customers would like the applicant's disfigurement. This evidence was uncontradicted. It was contended on behalf of the respondents that, in dealing with a declaration of liability as distinct from an award, an incapacity to earn owing to a disfigurement ought not to be treated as sufficient, and that it must be shown that the incapacity must be due to some physical inability to do the work :—

HELD : (i) incapacity due to physical disfigurement, which does not in fact prevent a man from performing his actual work is of precisely the same character and weight in deciding whether a declaration of liability should be granted as is a physical disablement which impedes a man in the actual physical execution of his work.

(ii) if the facts warrant a declaration of liability being made, there is no reason why it should not be made in a case where a man is entitled, or may be entitled, to immediate compensation, but is content to make no claim for the moment provided that his future rights are secured.

[EDITORIAL NOTE.] The purpose of a declaration of liability is to protect the interests of a workman who at the moment is not able to show a loss of earning power, but who has adequate grounds for believing that his injury may subsequently develop and thus reduce his earning capacity. It is a safeguard against any evidential difficulties which may arise on a claim being made at a later date. There is a *dictum* of LORD HANWORTH, M.R., expressed both in *Williams v. Tredegar Iron & Coal Co., Ltd.* (2) and *West Leigh Colliery Co., Ltd. v. McNeil* (3) that incapacity to earn owing to a physical disfigurement is not sufficient to warrant the granting of a declaration of liability, but that there must be an actual physical disablement. The opposite view was taken by SCRUTTON, L.J., in the former case, and SARGANT, L.J., the remaining member of the court in that case, expressed no opinion on the point. Since that expression of opinion by LORD HANWORTH, M.R., was merely a *dictum* which was not concurred in by the other members of the court, the Court of Appeal in this case has not felt itself bound by authority, and has held that physical disfigurement, if it affects a man's wage-earning capacity, is sufficient to warrant the granting of a declaration of liability.

AS TO DECLARATION OF LIABILITY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 930-932, paras. 1274-1276; and FOR CASES, see DIGEST, Vol. 34, pp. 433-437, Nos. 3532-3564. SEE ALSO WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 328-333.]

Cases referred to :

- (1) *Ball v. Hunt (William) & Sons, Ltd.* [1912] A.C. 496; 34 Digest 395, 3228; 81 L.J.K.B. 782; 106 L.T. 911; 5 B.W.C.C. 459.
- (2) *Williams v. Tredegar Iron & Coal Co., Ltd.* (1927). 96 L.J.K.B. 722; Digest Supp.; 137 L.T. 464; 20 B.W.C.C. 480.
- (3) *West Leigh Colliery Co., Ltd. v. McNeil* (1929), 22 B.W.C.C. 541; Digest Supp.
- (4) *King v. Port of London Authority*, [1920] A.C. 1; 34 Digest 434, 3518; 88 L.J.K.B. 889; 121 L.T. 587; 12 B.W.C.C. 260.

APPEAL by the applicant from an order of Deputy JUDGE H. ATKINS at Barnet County Court, dated Sept. 24, 1940. The facts and the arguments are fully set out in the judgment of SIR WILFRID GREENE, M.R.

P. H. Thorold Rogers for the appellant.

R. M. H. Everett and *H. Lester* for the respondents.

SIR WILFRID GREENE, M.R. : The appellant was employed as a milk roundsman in the employment of the respondent company. On Nov. 26, 1938, he suffered an accident. His cart was upset, and the falling bottles cut off his right ear and caused an injury to his right eye, the eyesight of which is to a certain extent affected. That second injury, however, is not relevant to the present appeal. The appellant was paid compensation at the full rate until May 1, 1939, when the respondents took him back into their employment, not as a roundsman, but in the yard, where he did light work at the reduced remuneration of £3 as against £3 10s., which represented his average pre-accident earnings. The payment was then reduced, and he was paid 5s. until Sept., 1939. On June 30, 1940, he began his military service, and in these proceedings he claimed payment of 9s. per week from Sept., 1939, when the payment had been stopped by the employers, until June 30, 1940. To that claim the respondents put in an answer in which, while denying liability, they submitted to paying compensation at the rate of 9s. per week from Sept. 1, 1939, to June 30, 1940, as claimed. For the purposes of the decision of this case, I attach no importance to the fact that that offer was made, or to the fact that, when the matter came on for hearing, the order for payment of that amount was made without any opposition by the respondents.

The arbitrator refused to grant any declaration of liability, which was the substantial relief which the appellant was claiming. That was not claimed in the original particulars, but due notice was given of an intention to ask for an amendment of the claim at the hearing, and no point arises upon that. The ground upon which a declaration of liability was asked was that, in the employment of a roundsman, the physical disfigurement from which the appellant was suffering as a result of the loss of his ear was such as to prejudice him in obtaining employment, because customers do not like milk to be delivered by a roundsman so disfigured. The way in which the judge dealt with the matter was this. The evidence of the appellant himself was that, on May 1, when he was taken back and put to work in the yard, one of the respondents' managers said : " He did not think the customers would like my disfigurement." Looking at that statement alone, I think that it is a statement of weight and importance in this case, because it is a statement by a person who should know the habits, tastes and prejudices of customers, and should know what would be likely to offend them. That admission having been made by the manager, it was perfectly properly put in evidence by the appellant himself in his statement of what the conversation was. In strictness, it is a type of expert evidence upon a matter which is, in my judgment, a matter for evidence, and not a matter for guessing without any evidence upon it. It does not seem to me to be relevant to consider the other evidence in dealing with this appeal. The appellant was put into the Army medical category I, and no doubt his particular injury was not one which would affect his capacity in the Army, but

the arbitrator, having before him no evidence to the contrary of what the manager had said, came to the following conclusion :

A Having seen the applicant in the witness-box, I doubt whether the reason given to the applicant by the respondents' managing director [he was in fact a manager] for refusing to employ him as a milk roundsman was the real one. In my opinion, the applicant's disfigurement was not such as to reduce his chance of getting work in his pre-accident occupation.

The arbitrator had done what he was perfectly entitled to do. He had seen the applicant and had observed the nature of his injuries. However, he appears to have based his decision upon the result of that observation, which led him to reject the statement which the manager
B had made, in holding that the appellant's account of the conversation was incorrect and thinking that the manager might well have had some reason other than that which he gave. Therefore, the arbitrator was putting his own observation against what I have already said was really a matter of expert evidence. In my judgment, he was not justified
C in doing that. The only evidence here was all one way, and the arbitrator was not entitled to reject it and substitute a conclusion of his own, based upon his personal observation of the man, without having place in a trade such as this, and what the idiosyncrasies, tastes or
D dislikes of customers might be. The proper way to obtain information of that kind is by evidence of persons who are acquainted with the trade. Here there was such evidence, and it was all one way. If there was nothing in it, it could have been contradicted. If the reason which the manager gave to the appellant, according to the appellant's account,
E was not a true reason, the manager could have been called to say what the true reason was. In that state of the evidence, the arbitrator was not entitled, in my opinion, to proceed as he did, and he was bound to accept the evidence before him as to the probable effect of this injury.

On that basis, the position is that the appellant has established what
F it is necessary for him to establish—namely, a reasonable probability that the result of his accident will lead to incapacity in the future, if and when he seeks to obtain work at his old type of employment. It seems to me that that is a matter which the arbitrator should have found to be established as a fact. It is argued by counsel for the respondents
G that, notwithstanding that fact, the case is not one in which a declaration of liability ought to be made. The first point which he takes is that, in dealing with declarations of liability as distinct from immediate awards, such an incapacity to earn owing to a disfigurement ought not to be treated as sufficient, and that the actual incapacity must be due
H to some physical inability to do the work, which was not present in this case. That distinction he finds on some observations of LORD HANWORTH, M.R., to which I shall refer in a moment. In *Ball v. Hunt (William) & Sons, Ltd.* (1) LORD MACNAGHTEN put the position in these words, at p. 500 :

“Incapacity for work,” as the phrase is used in the schedule seems to me to

does not have his position prejudiced by being put in the situation of having at a later date, possibly after the evidence has been scattered, or when it is not available, to ask for his compensation, in view of some change of circumstances or something which has happened. That is the object of a declaration of liability, and I can see no reason at all why, if the facts warrant such a declaration being made, it should not be made in a case where a man is entitled, or may be entitled, to immediate compensation, but does not choose to ask for it, or does not choose to litigate about it, and is content to accept the position that at the moment he will make no such claim, provided that his rights in the future are secured. It is to secure a man's rights for the future that a declaration of liability is made. In my opinion, in the present case, there is no reason at all why it should not be granted, and on principle it ought to be granted. In the result, therefore, the appeal will be allowed, the declaration of liability will be made, and the appellant must have the costs here and below.

CLAUSON, L.J. : I agree.

DU PARCQ, L.J. : I also agree.

Appeal allowed with costs in both courts. Order for declaration of liability.

Solicitors : *C. Grobel, Son & Co.* (for the appellant) ; *James Turner & Son & Whitehouse* (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

Re GRIFFIN HOTEL CO., LTD., JOSHUA TETLEY & SON, LTD. *v.* GRIFFIN HOTEL CO., LTD., AND JOHN LUPTON & SON, LTD.

[CHANCERY DIVISION (Bennett, J.), **November 11, 1940.**]

Companies—Debenture—Receiver—Winding-up order after appointment of receiver—Preferential debts—Debts incurred after appointment of receiver and before date of winding up—Whether entitled to priority—Companies Act, 1929 (c. 23), ss. 78, 264.

On Nov. 9, 1937, the first defendants issued a debenture to the plaintiffs containing a charge by way of floating security upon their undertaking and property, present and future, including their uncalled capital to secure repayment of a principal sum of £45,000 and further advances with interest. On Dec. 7, 1938, the plaintiffs issued a writ for the purpose of enforcing their debenture, and on Dec. 13, 1938, an order was made in the action appointing a receiver and manager of part only of the property then subject to the debenture, the remaining property being purposely excluded as it is subject to prior charges. On Mar. 15, 1939, an order was made for the winding up of the company by the court, and on July 10, 1939, the plaintiffs obtained a judgment which, *inter alia*, ordered an inquiry as to debts and liabilities of the company, which, under the Companies Act, 1929, ss. 78, 264, were payable out of the property subject to the floating charge in priority to the moneys secured by the debenture. The certificate of the registrar made in pursuance of the judgment showed that the debts due to 19

of the 30 creditors included in the schedule were incurred after the appointment of the receiver, and were outstanding at the date of the commencement of the winding up. In fact, none of these debts was incurred in connection with the property of which the receiver was appointed. The plaintiffs asked for an order that these debts were not entitled to priority :—

A HELD : the provisions of the Companies Act, 1929, s. 78, do not exclude or prevent the operation of sect. 264 (4) (b), and, to that extent, the preferential debts incurred after the appointment of a receiver and before the date of winding up are entitled to priority over the claims of the debentureholders in accordance with the provisions of sect. 264 (4) (b).
 B Sect. 264 (4) (b) does not operate, however, unless, at the moment of the winding up, there is still a floating charge created by the company. Since the charge, so far as it affected the property in respect of which the receiver was appointed, crystallised on his appointment, the creditors were not entitled to any priority in respect of the proceeds of that property. They were, however, entitled to priority in respect of the property excluded from his appointment, but that was useless to them, owing to the prior incumbrances.

C [EDITORIAL NOTE. After the appointment of a receiver by a debentureholder, the floating charge created by the debenture becomes crystallised; that is, it becomes a charge upon specific property, and, as such, is entitled to priority over all debts incurred subsequent to the appointment of the receiver. A receiver may, however, be appointed only in respect of part of the property included in a debenture, and then the preferential creditors are only deprived of their priority in respect of that part of the property and retain it over the remaining property.
 D Generally, however, this will be a barren right, because such a restricted appointment will usually be made for the sole reason that the remaining property is already so heavily incumbered by specific charges that it is useless to creditors other than the holders of those specific charges.

E AS TO PAYMENT OF PREFERENTIAL DEBTS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 518, 519, para. 840; and FOR CASES, see DIGEST, Supp., Companies, Nos. 4979a-4982d.]

Case referred to :

(1) *Re Lewis Merthyr Consolidated Collieries, Ltd., Lloyds Bank v. Lewis Merthyr Consolidated Collieries, Ltd.*, [1929] 1 Ch. 498; Digest Supp.; 98 L.J.Ch. 353; 140 L.T. 321; 22 B.W.C.C. 20.

F SUMMONS asking for an order that the certificate of the registrar, dated July 19, 1940, of the result of the accounts and inquiries under judgment in an action dated July 10, 1939, may be varied as follows—
 G namely, by disallowing or deleting the debts numbered 12-30 inclusive, amounting together to £385 0s. 6d. set out in Sched. IV to the certificate, which are thereby certified to be debts and liabilities of the defendant company the Griffin Hotel Co., Ltd., which, under the Companies Act, 1929, ss. 78, 264, are payable out of the property comprised in, or subject to, the floating charge created by the debenture referred to in the certificate in priority to the moneys secured by such debenture.

H W. Gordon Brown for the plaintiffs.
 J. A. Wolfe for the defendants.

BENNETT, J. : This summons raises a short question as to the construction in effect of the Companies Act, 1929, ss. 78, 264. The facts to which the language of the sections has to be applied are these. The

does not have his position prejudiced by being put in the situation of having at a later date, possibly after the evidence has been scattered, or when it is not available, to ask for his compensation, in view of some change of circumstances or something which has happened. That is the object of a declaration of liability, and I can see no reason at all why, if the facts warrant such a declaration being made, it should not be made in a case where a man is entitled, or may be entitled, to immediate compensation, but does not choose to ask for it, or does not choose to litigate about it, and is content to accept the position that at the moment he will make no such claim, provided that his rights in the future are secured. It is to secure a man's rights for the future that a declaration of liability is made. In my opinion, in the present case, there is no reason at all why it should not be granted, and on principle it ought to be granted. In the result, therefore, the appeal will be allowed, the declaration of liability will be made, and the appellant must have the costs here and below.

CLAUSON, L.J. : I agree.

DU PARCQ, L.J. : I also agree.

Appeal allowed with costs in both courts. Order for declaration of liability.

Solicitors : *C. Grobel, Son & Co.* (for the appellant) ; *James Turner & Son & Whitehouse* (for the respondents).

[*Reported by W. K. SCRIVENER, Esq., Barrister-at-Law.*]

Re GRIFFIN HOTEL CO., LTD., JOSHUA TETLEY & SON, LTD. *v.* GRIFFIN HOTEL CO., LTD., AND JOHN LUPTON & SON, LTD.

[CHANCERY DIVISION (Bennett, J.), **November 11, 1940.**]

Companies—Debenture—Receiver—Winding-up order after appointment of receiver—Preferential debts—Debts incurred after appointment of receiver and before date of winding up—Whether entitled to priority—Companies Act, 1929 (c. 23), ss. 78, 264.

On Nov. 9, 1937, the first defendants issued a debenture to the plaintiffs containing a charge by way of floating security upon their undertaking and property, present and future, including their uncalled capital to secure repayment of a principal sum of £45,000 and further advances with interest. On Dec. 7, 1938, the plaintiffs issued a writ for the purpose of enforcing their debenture, and on Dec. 13, 1938, an order was made in the action appointing a receiver and manager of part only of the property then subject to the debenture, the remaining property being purposely excluded as it is subject to prior charges. On Mar. 15, 1939, an order was made for the winding up of the company by the court, and on July 10, 1939, the plaintiffs obtained a judgment which, *inter alia*, ordered an inquiry as to debts and liabilities of the company, which, under the Companies Act, 1929, ss. 78, 264, were payable out of the property subject to the floating charge in priority to the moneys secured by the debenture. The certificate of the registrar made in pursuance of the judgment showed that the debts due to 19

of the 30 creditors included in the schedule were incurred after the appointment of the receiver, and were outstanding at the date of the commencement of the winding up. In fact, none of these debts was incurred in connection with the property of which the receiver was appointed. The plaintiffs asked for an order that these debts were not entitled to priority :—

A HELD : the provisions of the Companies Act, 1929, s. 78, do not exclude or prevent the operation of sect. 264 (4) (b), and, to that extent, the preferential debts incurred after the appointment of a receiver and before the date of winding up are entitled to priority over the claims of the debentureholders in accordance with the provisions of sect. 264 (4) (b).
B Sect. 264 (4) (b) does not operate, however, unless, at the moment of the winding up, there is still a floating charge created by the company. Since the charge, so far as it affected the property in respect of which the receiver was appointed, crystallised on his appointment, the creditors were not entitled to any priority in respect of the proceeds of that property. They were, however, entitled to priority in respect of the property excluded from his appointment, but that was useless to them, owing to the prior incumbrances.

C [EDITORIAL NOTE. After the appointment of a receiver by a debentureholder, the floating charge created by the debenture becomes crystallised; that is, it becomes a charge upon specific property, and, as such, is entitled to priority over all debts incurred subsequent to the appointment of the receiver. A receiver may, however, be appointed only in respect of part of the property included in a debenture, and then the preferential creditors are only deprived of their priority in respect of that part of the property and retain it over the remaining property.
D Generally, however, this will be a barren right, because such a restricted appointment will usually be made for the sole reason that the remaining property is already so heavily incumbered by specific charges that it is useless to creditors other than the holders of those specific charges.

E AS TO PAYMENT OF PREFERENTIAL DEBTS, see HALSBURY, Hailsham Edn., Vol. 5, pp. 518, 519, para. 840; and FOR CASES, see DIGEST, Supp., Companies, Nos. 4979a-4982d.]

Case referred to :

(1) *Re Lewis Merthyr Consolidated Collieries, Ltd., Lloyds Bank v. Lewis Merthyr Consolidated Collieries, Ltd.*, [1929] 1 Ch. 498; Digest Supp.; 98 L.J.Ch. 353; 140 L.T. 321; 22 B.W.C.C. 20.

F SUMMONS asking for an order that the certificate of the registrar, dated July 19, 1940, of the result of the accounts and inquiries under judgment in an action dated July 10, 1939, may be varied as follows—namely, by disallowing or deleting the debts numbered 12-30 inclusive, amounting together to £385 0s. 6d. set out in Sched. IV to the certificate,
G which are thereby certified to be debts and liabilities of the defendant company the Griffin Hotel Co., Ltd., which, under the Companies Act, 1929, ss. 78, 264, are payable out of the property comprised in, or subject to, the floating charge created by the debenture referred to in the certificate in priority to the moneys secured by such debenture.

H *W. Gordon Brown* for the plaintiffs.
J. A. Wolfe for the defendants.

BENNETT, J. : This summons raises a short question as to the construction in effect of the Companies Act, 1929, ss. 78, 264. The facts to which the language of the sections has to be applied are these. The

summons was issued by Tetley & Sons, Ltd., in a debentureholders' action in which they are the plaintiffs. The first defendants in the action, the Griffin Hotel Co., Ltd., are the borrowers who issued to the plaintiffs the debentures upon which they sue. I shall refer to these defendants as the borrowers. The second defendants, John Lupton & Sons, Ltd., are incumbrancers of the borrowers who have a charge upon the borrowers' property ranking after the charge created by the debenture held by the plaintiffs. They are not interested in the questions raised by the summons. A

The debenture held by the plaintiffs was issued to them by the borrowers on Nov. 9, 1937, to secure repayment of a principal sum of £45,000 and further advances with interest at the rate of £5 per cent. per annum. Such debenture contains a charge by way of floating security upon the undertaking of the borrowers and upon their property whatsoever and wheresoever, both present and future, including their uncalled capital. At the date when this debenture was issued, the borrowers owned the freehold of certain licensed premises at Leeds known as the Griffin Hotel, upon which they carried on the business of hotelkeepers. By way of collateral security for the principal moneys and interest lent to them by the plaintiffs, by a deed of mortgage dated Nov. 9, 1937, the borrowers specifically charged those freehold premises in favour of the plaintiffs. Subsequently, in 1938, the borrowers acquired for a term of 21 years from Feb. 26, 1938, some leasehold premises at Buxton known as the Spa Plaza Hotel and Laundry, together with certain furniture, chattels and effects. These premises, together with the goodwill of the business carried on by the borrowers thereon, became subject to the floating charge contained in the plaintiffs' debenture, but, by reason of consents given by the plaintiffs, their floating security over such premises is subject to a mortgage, dated Sept. 19, 1938, created by the borrowers in favour of one Alfred Wright Dando. C D E

The plaintiffs issued their writ in this action on Dec. 9, 1938, for the purpose of enforcing their debenture, and on the same day they obtained *ex parte* an interim order for the appointment of Gerald Cater Veale as receiver and manager. The terms of the order are important. I will read them *verbatim* so far as they are material : F

This court doth certify until over Dec. 12, 1938, the said Gerald Cater Veale receiver on behalf of the plaintiffs of all the property and assets of the defendants the Griffin Hotel Co., Ltd., except uncalled capital comprised in or subject to the charge created by the debenture dated Nov. 9, 1937, for £45,000 and further moneys issued by the said defendants and held by the plaintiffs except the Spa Plaza Hotel, Buxton, and other premises in or charged by a mortgage dated Sept. 14, 1938, and made between the said defendants of the one part and Alfred Wright Dando of the other part and to manage the business of the company so far as carried on upon and with the premises of which he is hereby appointed receiver. G H

The plaintiffs deliberately refrained from asking for the appointment of a receiver of the Spa Plaza Hotel and Laundry and the assets connected therewith, because, having regard to the prior incumbrances in favour of Dando, such hotel, laundry and assets were of no value

to them as a security. On December 13, 1938, an order was made in the action appointing Veale receiver and manager of the same property as that of which he had been appointed interim receiver and manager, the order being identical in terms with the order of Dec. 9, except that Veale's appointment as receiver was without any limitation as to time, and that the order contained the usual provisions as to the giving of security and a provision that Veale was not to act as manager after Mar. 1, 1939, without the leave of the judge.

On Mar. 15, 1939, an order was made for the winding up of the borrowers by this court. On July 10, 1939, upon a motion for judgment, the plaintiffs obtained the usual judgment in a debentureholders' action. Amongst other things, that judgment ordered an inquiry in the usual form as to whether or not there were any, and, if so, what, debts and liabilities of the borrowers which, under the Companies Act, 1929, ss. 78, 264, were payable out of the property comprised in, or subject to, the floating charge created by the plaintiffs' debenture in priority to the moneys secured by the debenture.

The certificate of the registrar made in pursuance of the judgment is dated July 19, 1940, and it sets out in Sched. IV the debts and liabilities which, under the Companies Act, 1929, ss. 78, 264, are payable out of the property comprised in, or subject to, the floating charge created by the debenture. The names of 30 creditors are contained in this schedule, each creditor's name being distinguished by a number. The registrar states at the foot of the schedule that debts due to creditors distinguished by the numbers 12-30, inclusive, were incurred after the date of the appointment of the receiver, and were outstanding at the date of the commencement of the winding up of the borrowers. The fact is that these debts were incurred by the borrowers exclusively in connection with the carrying on by them of the business of the Spa Plaza Hotel and Laundry at Buxton. None of those debts was incurred in connection with the property of which a receiver was appointed on Dec. 9, 1938.

The summons issued by the plaintiffs and now before me for decision asks for the following relief :

... an order that the certificate of the registrar dated July 19, 1940, of the result of the accounts and inquiries under the judgment in this action dated July 10, 1939, may be varied as follows—namely, by disallowing or deleting the debts numbered 12-30 inclusive, amounting together to £385 0s. 6d. set out in Sched. IV to the said certificate which are thereby certified to be debts and liabilities of the defendant company the Griffin Hotel Co., Ltd., which, under the Companies Act, 1929, ss. 78, 264, are payable out of the property comprised in, or subject to, the floating charge created by the debenture referred to in the said certificate in priority to the moneys secured by such debenture.

I do not think that the summons asks for the appropriate relief. The assets of which a receiver was appointed on Dec. 9, 1938, either have produced, or will produce, moneys sufficient to enable the debts in question to be paid. The other assets of the borrowers—namely, the Spa Plaza Hotel and Laundry—will not produce any money.

The real point is whether or not the creditors whose debts are in question have a right to have their debts paid in priority to the plaintiffs out of the proceeds of sale of the assets of which the receiver was appointed on Dec. 9, 1938. The plaintiffs do not object to an order giving the creditors in question a priority over any other assets of the borrowers, for there are none.

I will now read the relevant parts of the two sections of the Companies Act, 1929, which have to be construed. Sect. 264 (1) provides as follows :

In a winding up there shall be paid in priority to all other debts ; (a) All parochial or other local rates due from the company at the relevant date. . . ; (b) All wages or salary (whether or not earned wholly or in part by way of commission) of any clerk or servant in respect of services rendered to the company during 4 months next before the relevant date, not exceeding £50 ; (c) All wages of any workman or labourer not exceeding £25, whether payable for time or for piece work, in respect of services rendered to the company during 2 months next before the relevant date . . . ; (d) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, or unless the company has at the commencement of the winding up under such a contract with insurers as is mentioned in the Workmen's Compensation Act, 1925, s. 7, rights capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the said Act accrued before the relevant date ; (e) Unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation with another company, all amounts due in respect of contributions payable during the 12 months next before the relevant date by the company as the employer of any persons under either (i) the National Health Insurance Acts, 1924 to 1928 ; or (ii) the Widows', Orphans' and Old Age Contributory Pensions Act, 1925 ; or (iii) the Unemployment Insurance Acts, 1920 to 1929.

Subsect. (4) provides as follows :

The foregoing debts shall (a) Rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions ; and (b) In the case of a company registered in England, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

Sect. 78 provides as follows :

(1) Where, in the case of a company registered in England, either a receiver is appointed on behalf of the holders of any debentures of the company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are under the provisions of Part V of this Act relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures. (2) The periods of time mentioned in the said provisions of Part V of this Act shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be. (3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

On behalf of the respondents to the summons, the creditors whose debts are in question, it was argued that, if the order operates (i) by the appointment of a receiver at the instance of a debentureholder of any property covered by a floating charge, and (ii) by a winding up of the company which issued the debenture, the operation of

ect. 264 (4) (b) is not excluded by the provision of sect. 78, and that, if the company has incurred debts of the kind specified in sect. 264 (1) after the date of the appointment of the receiver and before the date of the winding up, those debts fall within the provisions of sect. 264 (4) (b), and, by force of the clear language of the subsection,

A . . . have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge.

In my judgment, the argument advanced on behalf of the respondents is sound to the extent that the provisions of sect. 78 do not exclude

B or prevent the operation of sect. 264 (4) (b). There is, in my judgment, no language in the sections which excludes or prevents the operation of subsect. (4) (b) in the supposed case. However, that conclusion upon the construction and effect of the statutory provisions leaves open the question whether or not, in the supposed events, there is, when the winding up takes place, any floating charge or any property subject to that charge. In my judgment, sect. 264 (4) (b) operates only if, at the moment of the winding up, there is still floating a charge created by the company, and it gives the preferential creditors a priority only over the claims of the debentureholders in any property which at that moment of time is comprised in or subject to that charge.

In the present case, the debenture held by the plaintiffs contained a floating charge over all the borrowers' property. On Dec. 9, 1938, that charge ceased to float upon the property and assets of which Veale was appointed receiver. The charge crystallised, and became fixed upon that property and those assets. It remained a floating charge upon any other assets of the borrowers. At the moment before the winding up order was made, the charge still floated over any other assets of the borrowers, and over those other assets, if any, the preferential creditors as defined by sect. 264 (1) have a priority over the claims of the plaintiffs, by force of the provisions of sect. 264 (4). This seems to be a corollary of the proposition established by *Re Lewis Merthyr Consolidated Collieries, Ltd., Lloyds Bank v. Lewis Merthyr Consolidated Collieries, Ltd.* (1).

I do not propose to make an order varying the certificate of the registrar, for I think that his certificate is in accordance with the judgment and the provisions of the two sections of the Companies Act, 1929, but I propose to make the following declaration upon this summons—namely, that the several creditors named in Sched. IV to the certificate made in this action and filed on July 19, 1940, and therein respectively distinguished by the numbers 12-30, inclusive, are not entitled to have their respective debts or any part thereof paid in priority to the claims of the plaintiffs in respect of their debenture, dated Nov. 9, 1937, out of any property or assets of the defendants the Griffin Hotel Co., Ltd., of which a receiver was appointed in this action on Dec. 9, 1938, but that such creditors are entitled to have their debts paid in priority to

the claims of the plaintiffs as aforesaid out of any other property of the defendants comprised in or subject to the floating charge contained in the debenture.

Solicitors: *Maxwell, Batley & Co.*, agents for *Simpson, Curtis & Burrill*, Leeds (for the plaintiffs); *Corbin, Greener & Cook*, agents for *Bennett, Brooke Taylor & Co.*, Buxton (for the defendants).

[Reported by IRENE G. R. MOSES, Barrister-at-Law.]

BROWNE AND OTHERS v. DE LUXE CAR SERVICES AND BIRKENHEAD CORPORATION.

[LIVERPOOL AUTUMN ASSIZES (Stable, J.), **October 29, 1940.**]

Tramways—Repair of road—Tramway operated by local authority—Tramway discontinued and lines filled in but rails not removed—Abandonment of tramway—Cesser of liability for repair of road as tramway authority—Tramways Act, 1870 (c. 78), s. 28.

In 1932, the tram service along a certain road which had been operated by the corporation, the second defendants, was discontinued. The tramlines were subsequently filled in with bitumen. The road itself was constructed of granite sets, which had become worn and were very slippery in wet weather. On June 27, 1939, a motor car, in passing a lorry, skidded, and killed one person, injured two others, and damaged the property of a fourth. The evidence proved that the driver of the car was driving in a perfectly proper manner, and attempted to pass the lorry in a perfectly proper way, but it was found as a fact that the sets had become worn and were not in a proper condition:—

HELD: although the rails had not been removed from the road, the undertaking had been abandoned, and the corporation were responsible for the condition of the road only as a highway authority, and not as a tramway authority. The corporation were, therefore, only liable for misfeasance, and not for non-feasance, and as, on the facts, there was no misfeasance, the corporation were not liable.

[EDITORIAL NOTE.] In recent years, many tramway undertakings have been abandoned and the tramlines filled in. In many cases, these undertakings were operated by the local authority, with the result that the local authority would be both a tramway authority and a highway authority. As a tramway authority, it would be liable for non-feasance, as well as for misfeasance, but, as a highway authority, it would, under a well-known principle of law, be exempt from liability for non-feasance. It becomes important, therefore, to determine at what stage the liability as a tramway authority ceases, and the consideration of that question is the chief point in this case.

AS TO LIABILITY OF TRAMWAY AUTHORITY FOR REPAIR OF ROAD, see HALSBURY, Hailsham Edn., Vol. 32, pp. 716, 717, para. 1038; and FOR CASES, see DIGEST, Vol. 43, pp. 344-346, Nos. 33-49.]

Case referred to:

- (1) *Dublin United Tramways Co. v. Fitzgerald*, [1903] A.C. 99; 43 Digest 344, 37; 72 L.J.P.C. 52; 87 L.T. 532.

CONSOLIDATED ACTIONS for damages for personal injuries sustained by the infant plaintiffs and for damage to his garage sustained by the plaintiff Harrison through the alleged negligence of the defendants. On

June 27, 1939, the two infant plaintiffs, the deceased G. B., and a fourth youth were cycling in a proper manner along New Ferry Road, Birkenhead. This road is constructed of sets with four tramlines along the centre filled in with bitumen. Trams were discontinued in 1932. A motor car the property of the first defendants, in passing a lorry, skidded into the cyclists, killing G. B. and injuring the two infant plaintiffs. Harrison's garage was also damaged. The actions subsequently brought were consolidated. The plaintiffs made allegations of negligence against the first defendants, and particulars of failure to take due care in driving were set out. Against the second defendants, it was alleged that they caused and/or allowed a road surface which was dangerous to traffic, in particular by the filling in of tramlines. In breach of the Tramways Act, 1870, ss. 28, 41, they failed to repair the road around the track and, after abandoning the tramway, to make good the road. The first defendants alleged that the accident was due to the negligence of the second defendants as particularised, or, alternatively, raised the defence of inevitable accident. The second defendants pleaded that the matters alleged were non-feasance, if proved, and for such they were not liable. They pleaded further that, as the work done under the Tramways Act, 1870, was done in 1932, they were covered by the Public Authorities Protection Act, 1893. They alleged also that the accident was solely due to the negligence of the first defendants.

E. G. Hemmerde, K.C., and *Allister M. Hamilton* for the plaintiffs.

G. J. Lynskey, K.C., and *H. I. Nelson* for the first defendants.

F. A. Sellers, K.C., and *A. E. Baucher* for the second defendants.

STABLE, J. : This case has reached, or is about to reach, a somewhat unfortunate result. I think the facts raise questions of some general importance, and so perhaps it will be convenient if first of all I arrive at the findings of fact from the evidence and then the conclusions of law to which those findings of fact impel me. On June 27, 1939, four lads, aged somewhere between 18 years and 14 years, were riding along the highway which leads from Chester to Birkenhead and thence through the Mersey Tunnel into Liverpool. No suggestion of negligence is made against any one of the boys who was riding his bicycle. On the contrary, it is quite clear from the evidence that they were riding their bicycles in a proper manner and in the proper part of the road, in single file with proper spacing between them. Through no fault of their own, or of any one of them, they were struck from behind by an overtaking motor car. Two of the boys were knocked off their bicycles and injured, though not very seriously, but the third of the four boys was killed. At the same time, the structure of one Harrison's garage, which in this respect was as passive and as innocent a participator in the accident as the cyclists, was damaged to the extent of some £50.

The plaintiffs in these consolidated actions are claiming damages,

first of all, against the proprietors of the motor car which actually knocked the boys over, and, alternatively, against the Birkenhead Corporation as the authority which was responsible for the condition of the road at the spot where the accident took place. As regards the driver of the car, in my view the law is quite plain. Where one has a motor car which knocks over a cyclist, or, as in this case, three cyclists, proceeding A in the same direction, riding properly on the proper side of the road, and then careers into a garage, on those facts standing alone and uncontradicted, there is a *prima facie* case that the driver of the motor car was negligent, and accordingly the burden of displacing that *prima facie* conclusion, and of proving that, whatever the cause of the B accident may have been, it was not attributable in any degree to any negligence on his part, shifts on to him. The evidence in this case satisfied me that this driver was driving absolutely properly. The accident took place in a restricted area, and the evidence is that the driver had been following a lorry for a considerable distance. The C lorry was proceeding at about 25 m.p.h. It was broad daylight, and in this wide highway—the road is somewhere about 40 ft. wide and as straight as a dart—the lorry driver, seeing him in the mirror of his cab at a point when there was no oncoming traffic, gave him the signal that he could pass him if he wished to do so. I think that the D driver of the car, driving that car with skill and care, proceeded to carry out this ordinary, simple and perfectly normal manœuvre. It is suggested that, because he said that he was about 25 yds. behind the lorry when he began to pass and it took him about 80 yds. in which to get clear, I must work out a sum which indicates that he must have accelerated too much to get past the lorry. It seems to me that that E proves nothing of the kind, because the science of mathematics is more or less an exact science, and, if one does the sum right, one knows what the answer is, but it depends on getting the factors of the sum right, and, of course, this driver's estimates of distance and so on are, like every F other estimate in this class of case, hopelessly approximate. The evidence of people who were there on the spot, so far from indicating any reckless or negligent or erratic driving, describes what the driver did as a perfectly normal operation carried out with due care and skill. G Because of the condition of the surface of the road, the driver most unexpectedly got into a skid, and that was what brought about the accident.

Pausing there, I do not wish it to be thought that in my judgment a skid, standing by itself, excuses an accident. There are skids and skids. There are a great many motorists who think that, when they H have said "I skidded," that absolves them from all further responsibility, either legal or moral, for any damage which they may have done in the course of that skid. That is not so. Many skids are caused by bad driving, reckless driving, careless driving or over-rapid driving, and I think that the burden of satisfying me that this skid was not a skid

that falls into any one of those categories lies on the driver of this car. He has satisfied me that there was no negligence on his part.

The next question of fact is the condition of the surface of the road. I am satisfied by the evidence here that the surface of the road at this point was extremely greasy. I do not think that that condition is
A attributable to the fact that there had once been tramlines along the road, and that they had been filled in with this bitumen or tar preparation. The evidence of one witness, who was an expert, was that in point of fact the bituminous part of the road was the one part of the road which was not as slippery as the rest. The treacherous surface
B was attributable to the fact that by long use and wear these granite sets had got a highly-polished surface which in wet weather, and sometimes in very dry weather, became extremely slippery.

In the course of the argument, counsel for the second defendants suggested, or submitted to me, that the real cause of the extreme
C slipperiness at this point was the fact that there must have been oil in unusual quantities on the surface outside the garage. If that was the state of affairs, neither the tramway promoters nor the highway authority would be responsible for the presence of the oil. In my judgment, there is no evidence to show that oil in any unusual quantities
D came from the garage, or from any other source, and was responsible for the treacherous surface of the road. In my judgment, the surface of the road was treacherous and dangerous because, in the course of time, these granite sets had become highly polished, and presented a surface which was certainly dangerous for a motorist—a danger which
E a motorist can, to some extent, counteract—and probably far more dangerous to horse-drawn traffic. What the condition of this road was when the tramways were first laid I do not know. The evidence is that from 1932 no trams have been run down this part of the road, and the tracks where the metal rails are laid have been filled in with
F this bitumen preparation, the rails themselves not having been taken away or pulled up, but having been left in the ground and the spaces filled in with bitumen.

The question is whether or not the Birkenhead Corporation is legally responsible for the consequences of that set of facts. That question,
G in my judgment, depends on the proper interpretation of the Tramways Act, 1870, s. 28. If the first sentence of that section is the part of the section which is applicable, then, in my judgment, the Birkenhead Corporation is legally responsible. If, on the other hand, it is the second sentence of the section which governs the matter, then, in my judgment,
H the Birkenhead Corporation has shed its role of tramway promoter, has dropped the obligations imposed on it as such, and has relapsed into the position of an ordinary highway authority.

Sect. 28 provides as follows :

The promoters shall, at their own expense, at all times maintain and keep in good condition and repair, with such materials and in such manner as the road

authority shall direct, and to their satisfaction [certain parts of the road on which the tramway system is run].

Counsel for the second defendants argued that that obligation is simply an obligation to do what the road authority directs them to do, but, in my judgment, it is an obligation much wider than that. It is an obligation on the tramway promoters, first of all, to keep the part of the highway for which they are responsible in good condition and repair, and I think that *Dublin United Tramways Co. v. Fitzgerald* (1) is an authority which shows that that is an obligation to keep that portion of the highway in a fit and proper condition for public traffic, motorists, pedestrians and horses. The words "with such materials and in such manner as the road authority shall direct" do not, in my judgment, cut down the obligation merely to do what the road authority should tell them, however negligent the road authority may be in pointing out what ought to be done. They impose a further obligation on the tramway promoters, not merely to keep the highway in good condition and repair, but also to achieve that result with the materials and in the manner the road authority prescribes.

In my judgment, if that part of the section applied, the plaintiffs would have been entitled to judgment against the corporation for having failed to keep in good condition and repair this part of the highway. It was not so kept at the time of this accident. To quote the words of LORD HALSBURY in *Dublin United Tramways Co. v. Fitzgerald* (1):

The obligation is cast upon them to keep the highway in a safe and fit condition for public traffic; they [the tramway promoters] are not to have a monopoly of the highway, and passengers, horse and foot, are to be allowed to cross those tramways as freely as they were before.

This was in 1902, only 38 years ago, but motorists were not even mentioned, and now they have to have a monopoly of our roads. If that was the obligation, then, in my judgment, on the facts here, this road was not in a safe and fit condition for public traffic. However, I do not think that that was the obligation. Sect. 28 continues as follows:

If the promoters abandon their undertaking, or any part of the same, and take up any tramway or any part of any tramway belonging to them, they shall with all convenient speed, and in all cases within 6 weeks at the most (unless the road authority otherwise consents in writing) fill in the ground and make good the surface, and, to the satisfaction of the road authority, restore the portion of the road upon which such tramway was laid to as good a condition as that in which it was before such tramway was laid thereon . . .

Thereupon, the obligation to maintain and keep the surface in good condition comes to an end. In this case, on the evidence, I think that the promoters had abandoned their undertaking in 1932. In fact, the evidence is that no trams have been run since then, and that buses have taken their place. The only question is whether or not they have taken up the tramway or any part of it. It is quite true that they have not pulled up the rails, but everything else connected with the tramways disappeared. The standards, and so on, for bringing the current to the

trams, the tram stops, and all the other apparatus of a tramway have been completely obliterated, and all that remains of the tramway is the steel rails which have been left in the ground, although they have been covered up with tar or something like that.

I do not think that it is a condition of bringing that part of the section into operation that the actual rails have to be taken up if it is found that the most convenient way, or the most economical way, is to leave the rails as part of the road and cover them up. The undertaking has been abandoned, and the tramway—using the word in a comprehensive sense, and not merely as confined to the rails—has been taken up. Then, I think, the conditions have been satisfied which bring to an end the obligation imposed by the first part of the section.

In the result, but with some regret on my part for these three boys, the action has failed—failed against the first defendants because I am satisfied that they were not negligent, and failed against the second defendants because, although I am satisfied that this road was not in the condition in which I should have liked to have seen it, the second defendants are under no obligation to make it so. In the result, the action fails, and must be dismissed, with the usual consequences.

Action dismissed with costs.

Solicitors: *Berkson & Berkson*, Birkenhead (for the plaintiffs); *Rutherfords*, Liverpool (for the first defendants); *G. F. Lees & Son*, Birkenhead (for the second defendants).

[*Reported by M. D. CHORLTON, Barrister-at-Law.*]

J. W. TAYLOR & CO. v. LANDAUER & CO.

[KING'S BENCH DIVISION (Singleton, J.), **October 1, 1940.**]

Contract—Excuses for non-performance—Impossibility of performance—Restrictions on dealing with goods except under licence.

Emergency Legislation—Control of cereals—Contract made before imposition of restrictions to be performed after imposition—Whether restrictions excuse performance of contract—Cereals and Cereal Products (Requisition and Control) Order, 1939 (S.R. & O., 1939, No. 1035), paras. 2, 3, 4, 6.

Before the outbreak of war, the sellers entered into a contract of sale with the buyers for the sale of 25 tons of Madagascar butter beans to be shipped from Madagascar to London Oct./Nov., 1939. The contract was an ordinary c.i.f. contract under which the sellers were bound, in due course, to give notice of appropriation and to tender documents. Before the due date for notice and tender, war broke out, and the Cereals and Cereal Products (Requisition and Control) Order, 1939, was made forbidding the buying or selling of cereals outside the United Kingdom without a licence, and also forbidding any person to have any dealings with any other person without such a licence. The sellers did not at any time apply for a licence, but on Feb. 14, 1940, long after the due date for notice and tender, they wrote to the Cereal Control Board asking whether licences to permit sellers to cover their pre-war sales of butter beans were granted, and, if so, the earliest date on which they were obtainable. The Board replied that, as far as it was aware, import licences had not been granted to permit sellers to

cover their pre-war sales of butter beans, that on the outbreak of war private trading ceased, and that nobody except the Ministry of Food was then allowed to import food into the country. The sellers contended that an application for a licence would have been refused, and that the terms of the order excused them from performance of the contract:—

HELD: the order did not have the effect of defeating, or putting an end to, the contract. The duty of the sellers was to apply for a licence to enable them to perform the contract. There was no reason to suppose that the licence, if applied for, would not have been granted, and the sellers were not, therefore, excused from performance of the contract.

[EDITORIAL NOTE. If an act of State, such as embargo on dealing with a certain commodity, makes it impossible for a party to a contract for sale of that commodity entered into before the time of the embargo to perform his part of the contract, he is excused from such performance. If, however, the embargo is not absolute, but permits dealings subject to a licence being obtained, the seller is not automatically excused from performance. His duty is to endeavour to carry out the contract by applying for a licence, and only if the licence is refused, is he excused. The Cereals and Cereal Products (Requisition and Control) Order, 1939, is an example of such a conditional embargo, and, since the sellers had failed to show—and the onus was upon them to do so—that, had a licence been applied for, it would have been refused, they were not excused from performing the contract.

AS TO EXCUSES FOR NON-PERFORMANCE, see HALSBURY, Hailsham Edn., Vol. 7, pp. 218, 219, para. 297; and FOR CASES, see DIGEST, Vol. 12, pp. 373, 374, Nos. 3099-3102.]

Case referred to:

- (1) *The Anglo-Russian Merchant Traders & Batt (John) & Co. (London)*, [1917] 2 K.B. 679; 12 Digest 397, 3223; 86 L.J.K.B. 1360; 116 L.T. 805.

APPEAL by the sellers by way of case stated from an award of an umpire in an arbitration between buyers and sellers on a question of the effect of the Cereals and Cereal Products (Control and Requisition) Order, 1939, on a contract of sale entered into before the date of the order but to be performed after such date. The facts and arguments are fully set out in the judgment.

Cyril T. R. Miller for the appellants.

Patrick A. Devlin for the respondents.

SINGLETON, J.: This dispute arises out of a contract between the parties, dated Aug. 3, 1939. Under that contract, the sellers, Landauer & Co., agreed to sell to the buyers, J. W. Taylor & Co., 25 tons of Madagascar butter beans new crop 1939, to be shipped from a port or ports in Madagascar to London as per bill of lading or bills of lading dated or to be dated Oct./Nov., 1939, at the price and otherwise upon the terms of the contract. The contract had on the back of it a number of terms or conditions and rules, of which the first, which is the most important for the purpose of this case, provides as follows:

Notice of appropriation with ship's name and approximate quantity loaded shall within 28 days from date of bill of lading be cabled by the shipper of the goods tendered under this contract direct to his buyer or to his house or representative or agent in Europe and be passed on by his buyer or by the said European house, or representative, or agent, and by each subsequent sellers, to his buyer within the said 28 days or in due course if received after that time; notices of

appropriation received after the said 28 days shall be passed on by telegram if sellers and buyers do not reside in the same country. Should the shipper's notice be delayed beyond the said 28 days through any cause beyond his control it shall be passed on to his buyer by the shipper's European house or representative or agent in due course but in no case later than 3 business days from arrival of documents in shipper's hands in London, and shall be passed on in writing by each seller to his buyer in due course on receipt; if sellers and buyers do not reside in the same town all such notices shall be passed on by telegram. All notices under this clause given by telegram shall be confirmed by letter. On demand of buyer, seller shall give a copy of the particulars contained in the notice of appropriation received from his seller, and buyer shall, on demand, give to seller a written receipt of notice of appropriation. A valid notice of appropriation when once given shall not be withdrawn.

The contract was an ordinary c.i.f. contract. In the ordinary case, it would have been for the sellers to give notice of appropriation and in due course to tender the documents. Their duty was to ship and to have bills of lading dated Oct., 1939, or Nov., 1939—that is, at the latest by Nov. 30, 1939—and under the conditions to which I have referred notice of appropriation should have been given by Dec. 28, and not later than that date. No notice of appropriation was given, and documents were never tendered. On Sept. 3, 1939, war broke out, and on the same day the Cereals and Cereal Products (Requisition and Control) Order, 1939, was made. That order came into force on Sept. 4, 1939. The sellers contend that under that order they are freed from performing their contract, and that they are not responsible to the buyers in damages for the failure to deliver, or, indeed, I should have said, for the failure to carry out their duty under the contract into which they had entered. The order begins with a recital in these terms:

Whereas it appears to the Board of Trade to be necessary for maintaining supplies and services essential to the life of the community and expedient that this order should be made. Now therefore in pursuance of the powers conferred upon them by the Defence Regulations, 1939, regs. 53, 55, and of all other powers them enabling, the Board of Trade hereby order as follows . . .

The order deals with, among other things, beans of the kind which were the subject-matter of the contract. Para. 2 of the order provides as follows:

Every person other than a miller owning or having power to dispose of or being in possession of any stocks situate in the United Kingdom either afloat or in any public granary, public warehouse, port granary, port warehouse or railway warehouse at the time of the coming into force of this order, is hereby required to place the whole of such stocks, if the total gross weight of such stocks exceed 50 tons, at the disposal of the Port Area Grain Committee appointed for the area in which such stocks are situate, and to deliver the same to them or to their order.

I only read that paragraph as showing one way in which the government through the Board of Trade seeks to take complete control of all stocks of beans or other articles of the kind comprised in the order. Three of the next four paragraphs are more important for the purpose of this case. Para. 3 provides as follows:

Every person owning or having power to dispose of or being in possession of any stocks which shall arrive in the United Kingdom after the coming into force of this order, is hereby required to place all such stocks forthwith on arrival at the disposal of the Port Area Grain Committee appointed for the area in which is situate the principal place of business of such person and to deliver the same to them or to their order.

The effect of that is that, whenever any person has power to dispose of, or is in possession of, stocks arriving in this country after Sept. 4, 1939, that person is required to place all such stocks at the disposal of the Port Area Grain Committee on behalf of the Board of Trade. Then para. 4 provides as follows :

Every person owning or having power to dispose of as the case may be, any stocks situate outside the United Kingdom, shall, if the total gross weight thereof exceeds 100 tons, comply with such directions as may be given by or on behalf of the Board of Trade for the purposes of securing that the ownership of all such stocks or the right to dispose thereof is transferred to the Board of Trade.

It is to be noticed that that paragraph deals only with stocks exceeding 100 tons in weight. It may be that it was not worth while taking power to deal with smaller quantities in foreign countries. As this contract dealt with only 25 tons of Madagascar butter beans, the paragraph would not apply. Para. 6 is the one on which reliance is placed by counsel for the appellants in his argument on behalf of the sellers, and it provides as follows :

No person shall except under the authority of a licence granted by the Board of Trade buy or sell or agree or offer or invite an offer to buy or sell any cereal or cereal product situate outside the United Kingdom, and no person shall except as aforesaid have any dealings with any other person in any cereal or cereal product so situate or agree or offer or invite an offer to have any such dealings.

It was pointed out to me that that paragraph is very wide in its terms. It forbids the buying or selling or agreeing to buy or sell without a licence, and it also forbids any person to have any dealings with any other person in any cereal or cereal product without such a licence. It is not in quite the same terms as the regulation which was considered by BAILHACHE, J., and later by the Court of Appeal, in *Re Anglo-Russian Merchant Traders & Batt (John) & Co. (London)* (1), but it is to be said that the paragraph is wide in its nature, and is, I think, as wide in its terms as was that with which the Court of Appeal were dealing in the case cited to me. It is very wide indeed.

Counsel for the appellants argued or submitted to me that the sellers were freed from their obligations under the contract by reason of that prohibition. He submitted that they were not at liberty to deal with the buyers in this matter without a licence granted by the Board of Trade, and, further, that they could not get a licence from the Board of Trade, and that, therefore, they were absolved from any obligation which they might otherwise have under the contract. It is admitted for the purpose of this case that the onus was upon him as representing the sellers to show that they could not get a licence. He said: "It is not enough for the sellers to say: 'We have not got a licence.' They must show, either that they applied for a licence and could not get one, or that, if they had applied for one, they would not have got one." In support of that argument, he referred me to the findings of the umpire, in particular to paras. 6, 7, 8, 9, 10 and 11. In para. 6, the umpire finds as follows :

That on Sept. 4, 1939, the sellers declared to the London Port Area Grain Com-

mittee the contract of Aug. 3, 1939, as a short sale thereby meaning that they had not purchased against it.

Para. 7 says that on Nov. 9, 1939, the secretary of the London Port Area Grain Committee wrote a letter to the buyers, the terms of which are set out. Para. 8 says that the London Port Area Grain Committee wrote a letter to the sellers in connection with the contract of Aug. 3, and that letter is again set out.

Both counsel for the appellants and counsel for the respondents rely upon the terms of those letters, but for different reasons. In para. 9 a further letter from the London Port Area Grain Committee to the sellers is set out, and in para. 11 it is found by the umpire as follows :

On Feb. 14, 1940, the sellers wrote to the Cereal Control Board asking for information whether licences to permit sellers to cover their bare sales of butter beans were granted and if so the earliest date they were obtainable to which the Cereal Import Committee on Feb. 23, 1940, wrote to the sellers as follows : " As far as we are aware import licences have not been granted to permit sellers to cover their pre-war sales of butter beans. On the outbreak of war private trading ceased and nobody except the Ministry of Food is allowed to import into this country on their own account."

The paragraphs which I have mentioned show that there were two bodies, each of which was acting, or purported to be acting, under the Board of Trade. One was the London Port Area Grain Committee, which is one of the committees mentioned in para. 1 of the order, and the other is the Cereal Control Board, which I am told was another committee or board set up by the Board of Trade for the purposes of carrying out this order. The precise functions of the two bodies I do not know.

Counsel for the appellants asked me to say that the umpire was wrong in his finding that, on the facts, the sellers were in default in not fulfilling the contract, and were liable in damages to the buyers for such failure. He said that the real case for the consideration of the court was whether, on the facts found by the umpire and on the true construction of the contract, the sellers were excused from performance of the contract. That is question (D) as set out by the umpire. Counsel for the appellants said that, if the facts were not sufficiently set out or found by the umpire, he would ask for the case to be remitted, in order that he might have the opportunity of getting a further finding of fact from the umpire. He said that because he saw a little difficulty in the wording of the letter from the Cereal Import Committee set out in para. 11 of the award :

As far as we are aware, import licences have not been granted to permit sellers to cover their pre-war sales of butter beans. On the outbreak of war private trading ceased and nobody except the Ministry of Food is allowed to import into this country on their own account.

That letter was written in response to an inquiry of the sellers dated Feb. 14, 1940, which of course is a long time after they ought to have shipped, after they ought to have appropriated goods to the contract and given notice of appropriation, and after they ought to have tendered documents. The inquiry was :

... whether licences to permit sellers to cover their bare sales of butter beans were granted and if so the earliest date they were obtainable.

Counsel for the respondents pointed out in reply that really that was a question quite different from anything I have to consider under this contract, because, he said, the duty of the sellers was to give notice of appropriation and to tender documents. If that was to be regarded as a dealing in goods comprised in the order, a licence was necessary. Counsel for the appellants recognised that the onus was upon him. His clients A had the opportunity of putting before the umpire all the facts which they desired him to consider in order to arrive at a determination of the question whether or not the sellers were absolved from the performance of their contract. They put the facts before him as best they could, and I judge from para. 11 of the award that the highest at which they B could put their case on the umpire's finding is that on Feb. 14, 1940, the sellers inquired from the Cereal Control Board whether licences to permit sellers to cover their bare sales of butter beans were granted, etc., and they got the answer which I have just read. That is not, as it seems to me, an answer to the question which faces one in this C case, and I see no reason why the sellers should be given another opportunity of going before the umpire and seeking to persuade him to take some view other than that which he has taken on the facts as placed before him by them.

Counsel for the appellants argued further that the whole object of this D order was that all goods of this nature should be requisitioned by the government or should come into the hands of the government. It may be that that was the object of the order, but I cannot see for myself that there is anything in the order which should lead one to the view that it seeks to defeat, or to put an end to, a contract between individuals E made before the outbreak of war. In the ordinary course, when the goods the subject-matter of the order come into the possession of the Board of Trade, payment will be made for them at some price which I suppose in the ordinary course is higher than the pre-war contract price. The real dispute in this case is this. There having been a contract between F the sellers and buyers a month before war broke out, can the sellers get out of their obligation to the buyers merely because of this order, and thereby keep the difference for themselves and put it into their own pockets? In the ordinary course, if the sellers had performed the contract, the goods would have been requisitioned from the buyers, who would G have been paid for them. The sellers did not want that, for some reason, or do not appear to have wanted it, because they did nothing whatever under this contract. They made no inquiry for a licence, or as to whether or not they could get a licence, until Feb. 14, 1940. In the ordinary course, if they had done their duty under the contract, as H counsel for the respondents pointed out, in the first place if they had sold short, they would have had to obtain a licence to buy from somebody and thereafter a licence to sell to the buyers in this case. They did neither of those things. If they had done that and had given notice of appropriation of goods and tendered the documents, then, under the

- strict reading of para. 7 of the order, it would have been the duty of the buyers to get a licence to buy from the sellers, unless the selling and buying had been comprised in the same licence, as, I suppose, it might have been. I think that counsel for the respondents was right in saying that the onus upon the buyers of getting a licence did not arise at least
- A until the documents were tendered to them. It cannot be said that they were in default. The sellers were in default, at any rate, from Dec. 28 onwards. It is admitted that the onus is upon them. It is conceded that they could not deal in the goods without a licence. What, then, was their duty? Their duty was to take the steps necessary to
- B enable them to perform their contract, and to take the steps envisaged by para. 6 of the order—namely, to apply for a licence. They did not. They did nothing, as I have said, until Feb. 14, 1940, and even then they did not apply for the licence necessary—namely, a licence to enable them to deal in the goods to the extent of appropriating goods to the
- C contract tendering the documents. I have no reason whatever to believe that, if they had done that within the proper time, such a licence would have been refused. Counsel for the appellants submitted that I ought so to find by reason of para. 11 of the award. Counsel for the
- D respondents asked me to look at the terms of the letters set out in paras. 7, 8, and 9 of the award, which letters I have not read in the course of my judgment. It is sufficient to say that it seems to me that the argument of counsel for the respondents on that point is sound. The letter in particular which is set out in para. 7 shows that the London Port Area Grain Committee contemplate the transaction of a bargain
- E and sale between the sellers and buyers being carried through. In other words, if a licence is necessary, a licence is contemplated in that, and the same applies to para. 8 of the case. I think that, if the facts set out by the umpire are considered, the only true conclusion which one can draw is that in all human probability, if application for a licence had been
- F made in the proper way at the proper time, it would have been granted. I certainly do not think that one can find from the terms of the letter set out in para. 11 of the award that a licence would not have been granted. That which was necessary was not applied for. A different thing was asked for or inquired into.
- G For those reasons, I am of opinion that the award of the umpire is correct, and the answer to question (D), which counsel for the appellants says is the important one, is that the sellers were not, on the facts as found by the umpire and on the true construction of the contract, excused from the performance of their contract. It follows that the
- H sellers will pay the costs of this case.

Award upheld. Sellers to pay the costs.

Solicitors: *Thomas Cooper & Co.* (for the appellants); *Richards, Butler & Co.* (for the respondents).

[Reported by D. K. BELCHER, Barrister-at-Law.]

RILEY v. WEARMOUTH COAL CO., LTD.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), November 1, 1940.]

Workmen's Compensation—Course of employment—Permitted act done in manner contrary to regulations—Mineworker riding on limber of tubs—Workmen's Compensation Act, 1925 (c. 84), s. 1 (2). A

A workman in a mine was employed in the care of the permanent way. He had also to help the boys in charge of the pit ponies. A pony became restless, and the workman took charge of it and drove it, sitting upon a limber of tubs in so doing. It was a breach of a regulation for the workman to ride upon the limber. He met with an accident while so riding, and died a day or two later in consequence. In a claim by his widow for compensation, it was contended that the workman was acting outside the scope of his employment at the time when he met with the accident:— B

HELD: the workman was performing his duty at the time of the accident, and, although he was doing it in a way contrary to the regulations, his widow was entitled to recover compensation by reason of the provisions of the Workmen's Compensation Act, 1925, s. 1 (2). C

Seviour v. Somerset Collieries, Ltd. (1) applied.

[EDITORIAL NOTE. The work here undertaken by the workman may be described as a subsidiary task. It was not the main work which he was employed to do, but work in which, in case of necessity, he was expected to give a hand. That being so, it was part of his employment, and a breach of the regulations made in respect of it was not sufficient to make the task so undertaken outside the scope of his employment. D

AS TO WORKMEN'S COMPENSATION ACT, 1925, s. 1 (2), see HALSBURY, *Hailsham Edn.*, Vol. 34, pp. 847-850, para. 1175; and FOR CASES, see DIGEST, Vol. 34, pp. 297-309, Nos. 2471-2545. See also WILLIS'S WORKMEN'S COMPENSATION, 32nd Edn., pp. 79-93.] E

Cases referred to:

(1) *Seviour v. Somerset Collieries, Ltd.*, [1940] 1 All E.R. 649; Digest Supp.; 33 B.W.C.C. 62.

(2) *Noble v. Southern Ry. Co.*, [1939] 2 All E.R. 817; Digest Supp.

(3) *Wilsons & Clyde Coal Co. v. M'Ferrin, Kerr v. Dunlop (James) & Co.*, [1926] A.C. 377; 34 Digest 301, 2499; 95 L.J.P.C. 130; 135 L.T. 164; 19 B.W.C.C. 1; affg. S.C. sub nom. *M'Ferrin v. Wilsons & Clyde Coal Co., Ltd.*, *M'Aulay v. Dunlop (James) & Co., Ltd.*, 18 B.W.C.C. 630, 680. F

(4) *Thomas v. Ocean Coal Co., Ltd.*, [1933] A.C. 100; Digest Supp.; 102 L.J.K.B. 142; 148 L.T. 219; 25 B.W.C.C. 436.

(5) *Harris v. Associated Portland Cement Manufacturers, Ltd.*, [1939] A.C. 71; [1938] 4 All E.R. 831; Digest Supp.; 108 L.J.K.B. 145; 160 L.T. 187; 31 B.W.C.C. 434; revsg., 30 B.W.C.C. 389. G

APPEAL by the employers from an award of His Honour JUDGE RICHARDSON sitting at Sunderland County Court, dated June 18, 1940. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R. H
F. A. Sellers, K.C., and *C. B. Fenwick* for the appellant company.
Gilbert J. Paull, K.C., and *W. Sexton* for the respondent.

Sellers, K.C.: The county court judge said that he would have decided this case in favour of the employers if it had not been for certain passages in the judgments in *Seviour v. Somerset Collieries, Ltd.* (1). He

would have been assisted, however, if he had had before him the decision of the House of Lords in *Noble v. Southern Ry. Co.* (2), which had not been published at the time the present case was heard. If *Noble v. Southern Ry. Co.* (2) had been available at the time, it would have solved the county court judge's difficulty. One can extract from *Noble's* case (2) the principle which ought to have been applied, and, if it had been applied, the decision of the county court judge would have been in favour of the employer. If a man is employed to do one job and he does another, he loses the protection of the Act. [Counsel referred to *Wilsons & Clyde Coal Co. v. M'Ferrin* (3).]

- A
- B *Paull, K.C.* : The applicant was entitled to succeed on the facts as found by the county court judge. Before an applicant can be deprived of compensation, there must be a finding that he has deserted his own work and has taken upon his shoulders the work of another. The question is whether or not the workman was doing something which it was his duty to do. If he was doing his duty, but made an improper use of the vehicle in so doing, he is entitled to recover. In *Thomas v. Ocean Coal Co., Ltd.* (4) a man was acting in breach of a regulation. Nevertheless, the accident arose out of and in the course of his employment. In *M'Aulay v. Dunlop (James) & Co., Ltd.* (3), it was held that a man must be doing something entirely different from his own work before the right to compensation can be lost. In the present case, the man was not out of his place, and he was assisting his employers at the time when he met with the accident. [Counsel referred to *Harris v. Associated Portland Cement Manufacturers, Ltd.* (5) and *Noble v. Southern Ry. Co.* (2).]
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- Sellers, K.C.*, in reply : The question whether or not the man arrogated to himself the duty of driving was put before the county court judge, who answered it in favour of the employers. He found for the applicant on other grounds. If there is an intermediate stage, it is not clear whether or not the county court judge has found that the present case comes within it.
- F

- SIR WILFRID GREENE, M.R. : The plaintiff in the present case is the widow of a man who was employed in the defendants' colliery as an engine plane man. On Sept. 28, 1939, he met with an accident, from which he died a day or two later. The accident was due to the fact that, while the man was riding on the limber of a set of full tubs in the colliery, something happened which caused the tubs to overturn, and the man was badly crushed, and eventually died. The county court judge awarded the widow, the applicant, the sum of £300 under the Workmen's Compensation Act, 1925, s. 1 (2), which provides as follows :
- G
- H

For the purposes of this Act, an accident resulting in the death or serious and permanent disablement of a workman shall be deemed to arise out of and in the course of his employment, notwithstanding that the workman was at the time when the accident happened acting in contravention of any statutory or other

regulation applicable to his employment, or of any orders given by or on behalf of his employer, or that he was acting without instructions from his employer, if such act was done by the workman for the purposes of and in connection with his employer's trade or business.

The controversy in the present case is whether or not the county court judge was entitled to hold, and was right in holding, that that subsection applied. In order that that subsection may apply, the accident must still arise out of and in the course of the employment. It has been pointed out more than once that the subsection does not make that any the less a relevant and material consideration. What it does, in effect, is to displace certain matters which, but for the subsection, would have led to the accident being held to be outside the scope of the employment.

The evidence in the present case was of this nature. The primary duty of the deceased workman consisted in the care of the permanent way, but he also had what I may call a subsidiary duty, which consisted in helping the boys who were in charge of the tubs if there was a breakdown or if they were in difficulty. If a pony was restless, for instance, it was his duty to help the boy with the pony. The evidence was to the effect that the pony in the present case was a fresh and high-spirited pony. The boy in charge of it at the time said that every time it was fastened on to the set it ran, and, at the time when the deceased took charge of the pony, it was going away. It seems to me that that evidence (and there was no evidence the other way) shows that what the deceased did was to find the boy in difficulty with the pony. The boy had left the pony in order to put the chock back on to the rail, and he was in difficulty in the sense that the pony was restive and was moving away before he could get back to it, and the deceased took the pony's head. When the accident happened, the deceased was (and the county court judge so found) unquestionably riding on the limber. In doing that, he was acting in breach of a regulation, and was doing something which it was unnecessary for him to do, and which was highly dangerous in itself.

The duties of the deceased being as I have stated, it is clear that, if, finding a pony which he thought to be restless, he took charge of it and led it on, and an accident happened to him while he was leading the restive pony, it could not be suggested that what he was doing was in any way outside the scope of his employment. That is one of the very things which it was his duty to do. Indeed, we are told that it was never suggested below on behalf of the employers that, if the deceased had been leading the pony at the time, the applicant could have failed to succeed. What was said was that the deceased was not leading the pony. He was in fact driving the pony from a place on the limber in which he had put himself. There is one further point to be observed on the facts. The boy with his pony, the set of tubs, and the deceased himself were moving—and were properly moving—in the direction of the shaft, away from the coal face. They were going out-

bye, as it is called. It was, therefore, within the scope of the deceased's employment at that very moment to be moving in that direction.

A The county court judge started his judgment by saying that the case would not have caused him any difficulty except for the decision of this court in *Seviour v. Somerset Collieries, Ltd.* (1). Quite apart from that case, he makes reference to the facts as they appeared to him, and in that reference he points out that the deceased was employed as an engine plane man, and was not employed to drive tubs. He deals with the suggestion that the deceased might have been helping the boy by holding the restive pony's head, but he negatives that by saying :

B If he had been doing this, however, he could not have been found in the position in which he was. There can be no doubt that he was riding.

Up to that stage, the county court judge no doubt rightly negatives the suggestion that, at the time of the accident, the deceased was holding the pony's head, but he fails to observe that that is not the
C end of the matter, because the mere fact that the deceased was on the limber, and was not holding the head of the pony, would not disentitle the widow to compensation if the true facts were that this was a method of looking after a restive pony which the deceased in fact chose to adopt rather than the method of leading it. If that were the true position,
D then, his duty being to take charge of a restive pony and to do what he thought right about it, which would include leading it if that were necessary, if he did that in an improper and negligent way, nevertheless he would still have been acting within the scope of his employment.

E The county court judge at this stage of his judgment does not appear to have appreciated that that is a matter of fact which it is very important to determine. He thought at this stage that the only question was whether the deceased was riding on the limber or leading the horse. He then goes on to say :

F The duties of the deceased were to keep the engine plane and wagon way in repair. It was Simmons' duty to drive the set out.

There, again, he puts into one watertight compartment, so to speak, the deceased's duty, and puts the boy's duty into another. He again fails to appreciate the importance of the fact that the two duties overlap, in the sense that one of the deceased's duties was to help with a
G restive pony.

Having dealt with these matters of fact, the county court judge comes to examine the authorities, and at the end of that examination he deals with *Seviour's* case (1). In *Seviour's* case (1), a workman improperly
H and in disobedience of orders rode on a full tub. An accident took place, and he sustained severe injuries. This court held that the workman was nevertheless entitled to compensation, because what he was doing was in the course of his employment, which at that particular moment of time involved getting from one point in the colliery to another. It was part of his business to do that, but what he did was to adopt an

improper and dangerous method of getting from that point to the other point. Nevertheless, that circumstance did not in any sense take him outside the scope of his employment.

Having considered that case, the county court judge then returned to the facts, and he came to this finding :

The deceased had to go outbye at the end of his shift, and was riding out on the limbers of the leading tub. A

That appears to me to embody the final conclusion of fact of the county court judge upon this matter after he had done what he was perfectly entitled to do—namely, instruct his mind by reference to the authorities as to what was the issue of fact to which he was to direct his attention. Having appreciated that that was the distinguishing fact which he had to have in mind, he answered the question in the sense that the man was properly going outbye, but was doing it in an improper way. That seems to me to mean this. Quite apart from the question of the restiveness of the horse, and putting that entirely aside for the moment, the county court judge finds a workman part of whose employment consists of getting from one point to another. To do that, the workman adopts an improper method, which is forbidden, and which is dangerous. Nevertheless, he adopts it for the purpose of getting from one point to another, and the accident takes place. That seems to me to bring the case entirely within *Seviour's* case (1). B C D

It was argued that the county court judge's judgment, taken as a whole, involves a different finding of fact—namely, that the workman was not doing his job in an improper way, but that he was doing somebody else's job—namely, the boy's job—in driving or leading the pony from one place to another, although the boy had no right to drive the pony from the limber. I cannot construe the judgment in that sense. As I have already pointed out, I think that the final conclusion of fact of the county court judge on what is the relevant matter is to be found in the passage which I have just cited, and, on that view, he has concluded the matter against the appellants by finding that what the workman was doing was a proper thing, although he adopted an improper method of doing it. It was argued that the deceased was doing the boy's job, and not his own. I do not doubt for a moment the proposition that, where one has a workman who is really in truth and in fact doing somebody else's job, and not his own, at the time of the accident, the accident does not arise out of his employment. Whether or not in any given case what the man is doing is in truth something which he has a right to do, but which he is doing in a wrong way, or is something which he has no right to do at all, and which, in fact, is not his job, is a question of fact which, in a borderline case, may not be easy to decide, but the mere circumstance that it was the boy's job to get the pony and the tubs to the place to which they were going does not necessarily lead to the conclusion that, when the deceased took a hand in that particular job—if that was what he was doing—he was performing the E F G H

boy's job. It seems to me that that conclusion does not by any means necessarily follow. It is a question of fact as to what he was doing at the time.

A The question whether or not, in moving the pony, the workman was really carrying out one of his duties is a matter to which the county court judge, so far as I can make out, did not really direct his mind, possibly because he did not appreciate that it was an important matter. As I have said, the evidence seems to me to be all one way that what the deceased was doing when he first began to deal with the pony was to take charge of a restive pony and to keep it moving under his control, B the boy being occupied with another job at the moment. If that be the true conclusion of fact—as, in my opinion, it is—does it make any difference if, instead of doing that by the normal method of leading the pony, he gets the pony in motion by jumping on the limber and driving it? It seems to me that there, again, it would be a case of doing C something which it was in the scope of his employment to do—namely, taking charge of and arresting a restive pony—but doing it in a wrong way—namely, by getting on the limber and driving the pony, instead of leading the animal. I should have had no difficulty on the evidence in this case in drawing those inferences and coming to those conclusions D of fact. The county court judge did not direct his mind to that question, and I am therefore entitled to come to my own decision upon it in view of the evidence, and it seems to me that that question should be decided in that way. In the result, the appeal fails, and must be dismissed with costs.

E CLAUSON, L.J.: I am in complete agreement with all that SIR WILFRID GREENE, M.R., has said, and, in concurring in the result he has stated, I add nothing.

GODDARD, L.J.: I also agree.

Appeal dismissed with costs.

F Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Cooper & Jackson*, Newcastle-upon-Tyne (for the appellants); *T. D. Jones & Co.*, agents for *R. W. Williams*, Durham (for the respondent).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

G
***Re* HARLAND-PECK, HERCY v. MAYGLOTHLING AND ANOTHER.**

[COURT OF APPEAL (Scott, Clauson and Luxmoore, L.J.J.), **August 27, 28, November 14, 1940.**]

H *Executors—Order of application of assets—Lapsed share of residue—Duties to be paid out of estate—Whether direction sufficient to displace statutory order—Administration of Estates Act, 1925 (c. 23), ss. 32, 34 (3), Sched. I, Part II.*

The testatrix died on Mar. 2, 1939. After providing for the payment of a number of legacies, her will contained the following provision: "Subject to the payment of my funeral and testamentary expenses

death duties including estate duty and increment value duty if any and debts and the legacies bequeathed by this my will or any codicil thereto and the legacy duty on legacies bequeathed free of duty I devise and bequeath all the rest and residue of my property of whatever kind or nature and wherever situate whether real or personal including any property in respect of which I have a general power of appointment" to the plaintiff and G. in equal shares. G. predeceased the testatrix, and his share of the residue therefore lapsed. The question arose as to whether the primary fund for the payment of the funeral and testamentary expenses and of the pecuniary legacies and the legacy duty on legacies bequeathed free of duty was the lapsed share as to which the testatrix died intestate, or whether such liabilities should be borne rateably by the entire residuary estate of the testatrix, that is to say, whether the words of the will quoted above were sufficient to vary the order of the application of assets prescribed by the Administration of Estates Act, 1925, Sched. I, Part II:—

HELD: the words of the will quoted above amounted to a charge of the debts and administration and other expenses referred to on the whole residue and were inconsistent with the payment of those items out of the lapsed share. They were, therefore, sufficient to vary the statutory order of the application of assets, and the funeral, testamentary and administration expenses and debts of the testatrix, and the pecuniary legacies and the legacy duty on legacies bequeathed free of duty, ought to be paid rateably out of the entire residuary estate of the testatrix.

[EDITORIAL NOTE.] The Administration of Estates Act, 1925, s. 34 (3) and Sched. I, Part II lay down a new order for the application of assets in the case where the estate of the deceased is solvent. This order may be varied by the terms of the will, and, in a number of cases, various forms of words used by testators have been construed by the court as to whether they are sufficient to vary the statutory order. The general trend of the decisions has been to divide these expressions into two classes. The first class consists of those expressions which are sufficient to charge the debts and expenses upon the entire residue. In the second class there is a mere direction to pay specified items, unsupported by any charge expressed or implied. These two classes are distinct enough in themselves, but the varying forms of words used in wills are apt to produce borderline cases in which the problem of construction is a most difficult one. As is shown in the judgment herein, the result of adopting one particular construction is often a matter of considerable pecuniary importance to the beneficiaries.

AS TO ORDER OF APPLICATION OF ASSETS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 375-377, para. 704; and FOR CASES, see DIGEST, Supp., Executors and Administrators, Nos. 5908a-5919a.]

Cases referred to :

- (1) *Trethewy v. Helyar* (1876), 4 Ch.D. 53; 24 Digest 850, 8839; 46 L.J.Ch. 125.
- (2) *Fenton v. Wills* (1877), 7 Ch.D. 33; 24 Digest 850, 8840; 47 L.J.Ch. 191; 37 L.T. 373.
- (3) *Blann v. Bell* (1877), 7 Ch.D. 382; 24 Digest 851, 8852; 47 L.J.Ch. 120.
- (4) *Fisher v. Fisher* (1838), 2 Keen, 610; 23 Digest 525, 5919; 7 L.J.Ch. 176.
- (5) *Wood v. Ordish* (1855), 3 Sm. & G. 125; 23 Digest 519, 5857; 25 L.T.O.S. 327.
- (6) *Ryves v. Ryves* (1871), L.R. 11 Eq. 539; 23 Digest 525, 5916; 40 L.J.Ch. 252.
- (7) *Re Worthington, Nichols v. Hart*, [1933] Ch. 771; Digest Supp.; 102 L.J.Ch. 273; 149 L.T. 296.
- (8) *Re Lamb, Vipond v. Lamb*, [1929] 1 Ch. 722; Digest Supp.; 98 L.J.Ch. 305; 141 L.T. 60.

- (9) *Re Sanger, Taylor v. North*, [1939] Ch. 238 ; [1938] 4 All E.R. 417 ; Digest Supp. ; 108 L.J.Ch. 165 ; 159 L.T. 603.
- (10) *Re Kempthorne, Charles v. Kempthorne*, [1930] 1 Ch. 268 ; Digest Supp. ; 99 L.J.Ch. 107 ; 142 L.T. 111.
- (11) *Re Tong, Hilton v. Bradbury*, [1931] 1 Ch. 202 ; Digest Supp. ; 100 L.J.Ch. 132 ; 144 L.T. 260.
- A (12) *Re Petty, Holliday v. Petty*, [1929] 1 Ch. 726 ; Digest Supp. ; 98 L.J.Ch. 207 ; 141 L.T. 31.
- (13) *Re Atkinson, Webster v. Walter*, [1930] 1 Ch. 47 ; Digest Supp. ; 99 L.J.Ch. 35 ; 142 L.T. 129.

APPEAL by the first defendant from an order of FARWELL, J., dated June 13, 1940. The facts are fully set out in the judgment of the court delivered by LUXMOORE, L.J.

R. F. Roxburgh, K.C., and *L. R. Norris* for the appellant.

H. B. Vaisey, K.C., and *Raymond W. Jennings* for the respondent.

Roxburgh, K.C. : One question which arose was whether or not there could be said to be anything undisposed of until the funeral and testamentary expenses and other charges had been cleared. That is, has there been any gift until they have been paid ? I should be prepared to argue that there was no share undisposed of, but it is not open to me to do so, as it has been decided by the Court of Appeal in *Re Worthington, Nichols v. Hart* (7) that a lapsed share is property undisposed of for the purposes of the schedule. The other question is whether or not, in the present case, the testator has declared an order of assets different from that contained in the Administration of Estates Act, 1925. In the present case, the words of the will are slightly different from those used in other cases which have been before the courts, but they are indistinguishable in principle. The principle which emerges from the decided cases is that, if there is merely a direction that funeral and testamentary expenses are to be paid out of the estate, without any indication as to the part out of which they are to be paid, that is not an expression which varies the order of application set out in the Act. If, however, there is an indication as to the part out of which those expenses are to be paid, there is a direction which varies the order of application. If there is a doubt in any particular case, the court finds assistance, on the matter of principle, from the decided cases. *Re Kempthorne, Charles v. Kempthorne* (10) is identical with the present case, because the words "subject to" and "subject to and after" are indistinguishable. *Re Kempthorne, Charles v. Kempthorne* (10) was followed by *Re Tong, Hilton v. Bradbury* (11), in which it was stated that the mere direction to pay the duty out of the estate was not sufficient to vary the order of application. *Re Worthington, Nichols v. Hart* (7) was a case in which nothing was said in the will about debts and funeral and testamentary expenses. There was simply a gift of residue following a gift of pecuniary legacies. The distinction between *Re Worthington, Nichols v. Hart* (7) and *Re Kempthorne, Charles v. Kempthorne* (10) is to be found in the judgment of ROMER, L.J., in *Re*

Tong, Hilton v. Bradbury (11). The difference is whether the direction is regarded as one as to the manner in which the executors are to administer the estate or one as to the manner in which the burden is to be borne as between the beneficiaries. In *Re Kempthorne, Charles v. Kempthorne* (10), the language indicates that the reference is to the incidence of the burden. It is more than a direction to pay out of the estate, which direction is capable of being construed as an administrative direction. A

Vaisey, K.C. : There are two indications in the Act which show that one must find something in the will to negative the order of application contained in the schedule. The idea which lies behind the provisions of the Act is that a testator will be more likely to prefer the named person, if he survives, than the person who will benefit upon an intestacy. B The clause in the will means that nobody is to get anything until the preliminary expenses have been cleared off, but, as between those entitled to claim the benefit of the testator's bounty, it leaves entirely open the question of how these obligations are to be recouped or adjusted as C between the beneficiaries themselves. In the present case, full force can be given to the will without displacing the statutory provisions. There are no provisions in the will which vary the order laid down and which require the exclusion of the statutory provisions. The main D ground for the decision in *Re Kempthorne, Charles v. Kempthorne* (10) was that the residue did not come into existence until the obligations had been discharged. The division of the residue into 7 parts was subsequent to the discharge of the obligations, and that division was followed by the words : " I bequeath." *Re Tong, Hilton v. Bradbury* (11) E and *Re Worthington, Nichols v. Hart* (7) are decisions in favour of my main proposition. If *Re Kempthorne, Charles v. Kempthorne* (10) and *Re Worthington, Nichols v. Hart* (7) are not reconcilable, the court must follow *Re Worthington, Nichols v. Hart* (7) and *Re Tong, Hilton v. Bradbury* (11). [Counsel referred to *Re Lamb, Vipond v. Lamb* (8).] F

Jennings, following on the same side : There is a distinction between *Re Kempthorne, Charles v. Kempthorne* (10) and the present case. If the will directs, first, that the obligations shall be discharged, secondly, that what is left shall be divided into shares, and, thirdly, that a share shall be given to each beneficiary, what is in terms undisposed of is a share after discharge of the obligations. *Re Kempthorne, Charles v. Kempthorne* (10) is such a case. If, however, the obligations are merely G charged on the estate generally, although it may be that the property "undisposed of" is the estate less obligations, still, this is not the way in which the testator has dealt with the matter by his will. For the H purpose of applying the provisions in question, the manner in which the testator has dealt with the matter is the true test.

Roxburgh, K.C., in reply : The schedule has no application to lapsed shares of residue, because they are not ascertained until the debts are paid. That argument, however, is not open to me in this court. Any-

- thing which is not disposed of in connection with residue is not residue. The schedule does not apply to lapsed shares of residue, although it does apply to lapsed legacies. If I am wrong about that, and if this lapsed share of residue is something to which the schedule applies, it may well be that the Act requires a contrary intention to be expressed
- A in the event of an intestacy. That second point is inconsistent with the decision in *Re Kempthorne, Charles v. Kempthorne* (10), and it is inconsistent with the *ratio decidendi* in both *Re Worthington, Nichols v. Hart* (7) and *Re Tong, Hilton v. Bradbury* (11). In *Re Tong, Hilton v. Bradbury* (11), ROMER, L.J., provided a means for reconciling the
- B decisions in *Re Kempthorne, Charles v. Kempthorne* (10) and in *Re Worthington, Nichols v. Hart* (7) by saying that a direction to pay debts may be ambiguous. It may be a direction to executors to carry out what is their legal duty, and may not be intended to affect beneficial interests at all. If, however, there is annexed to the gift of the beneficial
- C interest a burden which that beneficial interest has to bear, the contrary result ensues. That is the effect of *Re Kempthorne, Charles v. Kempthorne* (10). If it is conceded, as it must be conceded on the authorities, that the reference in the will need not expressly refer to an intestacy, nothing could be stronger than the direction in *Re Kempthorne,*
- D *Charles v. Kempthorne* (10) and the direction in the present case. There could be nothing stronger unless there were an express reference to intestacy. If the court can apply *Re Kempthorne, Charles v. Kempthorne* (10) and distinguish *Re Worthington, Nichols v. Hart* (7) and *Re Tong, Hilton v. Bradbury* (11), then, in the circumstances of
- E this case, it should do so.

- LUXMOORE, L.J. [delivering the judgment of the court]: Mrs. Agnes Harland-Peck (hereinafter referred to as the testatrix) was a lady of considerable wealth. She died on Mar. 2, 1939. Her estate
- F was valued for probate at over £298,000. The estate duty thereon amounted to over £80,000. By her will, which was dated June 3, 1920, she appointed the plaintiff, one Barker, and Dr. Gibbons to be her executors. She gave a number of pecuniary legacies, amounting in the aggregate to £25,700, some of which she directed to be paid free of
- G duty, and she also made a number of specific gifts, including the gift of her business (carried on under the style of William Harland & Son), and the land occupied by it, the goodwill thereof and the stock-in-trade, machinery, plant and effects employed therein, and the benefit of all subsisting contracts, and all book debts and moneys due to her
- H or standing to the credit of her business account at her bankers, in certain proportions to a number of persons employed by her in the business.

Her will contained this provision :

Subject to the payment of my funeral and testamentary expenses death duties including estate duty and increment value duty if any and debts and the legacies bequeathed by this my will or any codicil hereto and the legacy duty on legacies

bequeathed free of duty I devise and bequeath all the rest and residue of my property of whatsoever kind or nature and wheresoever situate whether real or personal including any property in respect of which I have a general testamentary power of appointment to [the plaintiff and Dr. Gibbons in equal shares].

On June 9, 1920, the testatrix made a codicil to her will, by which she reduced from £10,000 to £5,000 one of the pecuniary legacies given by her will, thereby reducing the total amount of such legacies from £25,700 to £20,700, but she did not otherwise alter her will, which in all other respects she confirmed. Dr. Gibbons predeceased the testatrix, and consequently the beneficial interest in her residuary estate given to him by the will lapsed.

Two questions arose in the administration of her estate, and on Apr. 16, 1940, an originating summons was issued at the instance of the plaintiff for the determination of these questions. The questions, as framed in the originating summons, are these :

- (1) Whether upon the true construction of the testatrix' will the debts and liabilities of the said business of William Harland & Son subsisting at the date of the testatrix' death should be borne by the persons who are, whether under the will of the testatrix or on her partial intestacy, entitled to the said business and in shares proportionate to their shares therein, or whether the said debts and liabilities should be borne by the testatrix' residuary estate in a due order of administration.
- (2) Whether (a) the primary fund for the payment and discharge of the funeral, testamentary and administration expenses and debts of the testatrix and of the pecuniary legacies bequeathed by her will and codicil and of the legacy duty on legacies bequeathed by her said will free of duty or of any and which of such liabilities is that part of the testatrix' estate as to which she died intestate, or (b) such liabilities should be borne rateably by the entire residuary estate of the testatrix.

The originating summons was heard by FARWELL, J., on June 13, 1940. The judge made a declaration that, upon the true construction of the will of the testatrix, (a) the debts and liabilities of the testatrix incurred in carrying on the business of William Harland & Son and subsisting at the date of her death ought to be borne by the residuary estate of the testatrix, and (b) the primary fund for the payment and discharge of the funeral, testamentary and administration expenses and debts of the testatrix (including therein the debts and liabilities of the business) and of the pecuniary legacies bequeathed by her will and codicil and of the legacy duty on legacies bequeathed by her will free of duty, is that part of the estate of the testatrix as to which she died intestate.

The defendant Mayglothling, who is the next of kin of the testatrix, has appealed from that part of the order which is contained in subpara. (b) of the declaration set out above, and asks that, in lieu thereof, it may be declared that the funeral, testamentary and administration expenses and debts of the testatrix, including therein the debts and liabilities of her business and the pecuniary legacies bequeathed by her will and codicil, and the legacy duty on legacies bequeathed by her will free of duty, ought to be paid and discharged rateably out of the entire residuary estate of the testatrix. The difference between these declarations to the plaintiff and the appellant respectively is considerable. Under the

declaration made by FARWELL, J., the beneficial interest taken by the plaintiff bears no part of the various items referred to in the declaration, unless (as appears most unlikely) one-half of the residuary estate, after deducting those items from the entirety of such estate, is less than one-half of the total amount of those items. The difference can perhaps

A best be illustrated by the application of the declaration to figures, some of which are necessarily hypothetical. Assume, first, that the whole estate is realised at its probate valuation—namely, £298,000. Deduct from this the aggregate value of the business and the various items of property included in the specific gift thereof and the specific bequests—

B say an aggregate sum of £38,000. This leaves £260,000 to satisfy the various items referred to in the declaration, amounting together to, say, £110,000. On this footing, the plaintiff would receive, under the declaration made by FARWELL, J., the sum of £130,000 and the appellant £20,000, whereas, on the appellant's contention, the plaintiff and the

C appellant would each receive £75,000. There can be no question but that, if the testatrix had died before Jan. 1, 1926, and if Dr. Gibbons had pre-deceased her, the declaration for which the appellant contends would—assuming that there was no residuary real estate—have been applicable, and, on the hypothetical figures, the plaintiff would have

D taken £75,000 and the appellant would have taken the like amount, for, on the law as it stood before Jan. 1, 1926, there was no room for any question of construction, it being then well-settled that, in the absence of any contrary direction in the will, and whether or not the residuary personal estate was bequeathed subject to the payment of such items

E funeral, testamentary and administration expenses, as well as legacies,, were payable out of the general personal estate, and not primarily out of a lapsed share of residue : *Trethewy v. Helyar* (1), *Fenton v. Wills* (2) and *Blann v. Bell* (3). If, however, the testatrix' residuary estate consisted of realty as well as personalty, then the various items referred

F to in the declaration would have been payable out of the residuary personalty in priority to the residuary realty, there being nothing in the will to place the realty on an equality with the personalty in respect of charge, and, consequently, if the personalty was sufficient for the purpose, the plaintiff would have taken one-half of the balance remaining

G of the residuary personalty after the discharge of the specified items, together with one-half of the residuary realty. The appellant would have taken the other half of the balance of the residuary personalty, and the heir-at-law the other half of the residuary realty : *Fisher v. Fisher* (4), *Wood v. Ordish* (5) and *Ryves v. Ryves* (6). In each case, the

H interest of the plaintiff, the next of kin and the heir-at-law, as the case might be, would have been ascertained on the footing that the dispositions of the will were effective, the next of kin and heir-at-law taking precisely the same interest in the residuary personalty and residuary realty as Dr. Gibbons would have taken if he had not pre-deceased the testatrix. It is equally clear that, in each of the hypo-

thetical cases referred to, the provisions of the testatrix' will would have effected a change in the established order of administration of assets before Jan. 1, 1926, and that such change would have been effected by reason of the charge on the residuary personalty and realty resulting from the direction in the will that the gift of the residuary personalty and realty was to be "subject" to the payment of the debts and liabilities and other items specifically mentioned. A

The present question has arisen owing to the alteration of the law by reason of the passing of the Administration of Estates Act, 1925, which came into force on Jan. 1, 1926. By sect. 32 of that Act, real and personal property are constituted assets for the payment of debts and liabilities, and are placed on an equality with regard to the payment of debts, liabilities, funeral and testamentary and administration expenses and legacies, the primary liability of the personalty being thereby abolished. Sect. 34 (3) provides as follows: B

Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereinafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act. C

Property is defined in sect. 55 (xvii) of the Act as including a thing in action and any interest in real or personal property. Sched. I, Part II, is headed: "Order of application of assets where the estate is solvent." Para. 1 provides that the first item of property to be applied in discharge of the various items mentioned is property of the deceased undisposed of by will, subject to the retention thereof of a fund sufficient to meet pecuniary legacies, while para. 8 (a) thereof provides that the order of application may be varied by the will of the deceased. Since the testatrix died after the date when the Act came into force, it is plain that regard must be had to the provisions thereof to which we have referred, for the will and the codicil confirming it must be construed as taking effect at the death of the testatrix. D E F

Counsel for the appellant submitted that the first question which arises is whether, on the true construction of Sched. I, Part II, para. 1, there is any property undisposed of by the will. He argued that, to any person reading the will and codicil without knowledge of the fact that Dr. Gibbons predeceased the testatrix, there would appear to be a complete disposition of the whole of her property, and that it is only when the fact of Dr. Gibbons' predecease is known to the reader that he is able to say that the disposition of the will in favour of Dr. Gibbons cannot be carried into effect and must pass to the testatrix' next of kin as if the testatrix had died intestate. In order to define what is to pass as on an intestacy, the share which Dr. Gibbons would have taken if he had not predeceased the testatrix must be ascertained in the same way as would have been the case if he had in fact survived her. So far as the testatrix' will is concerned, there is a disposition in G H

A favour of Dr. Gibbons, but that disposition cannot take effect, because the law provides for its lapse by reason of Dr. Gibbons' death in the testatrix' lifetime. Counsel for the appellant frankly admitted that the argument was not open to him in this court by reason of the decision in *Re Worthington, Nichols v. Hart* (7), approving the decision of EVE, J., in *Re Lamb, Vipond v. Lamb* (8). The point, therefore, was not further developed or argued. Plainly this court is bound by the decision in *Re Worthington, Nichols v. Hart* (7), and must treat the interest given to Dr. Gibbons by the will as undisposed of by it within the true meaning of Sched. I, Part II, para. 1.

B The next question is whether there is any provision in the will and codicil of the testatrix which prevents the application of the order of administration set out in Sched. I, Part II, for sect. 34 (3) provides that that order is to apply only subject to, among other things, the provisions of the will, while Sched. I, Part II, further provides by para. 8 (a) C that the order of administration thereby laid down may be varied by the will. It seems to us that there is no substantial difference between these two provisions. The direction in sect. 34 (3) that the order is to apply only subject to the provisions of the will means that the provisions of the will must be examined before it can be determined whether D the order set out in Sched. I, Part II, is to apply either in its entirety or with or without variations, while Sched. I, Part II, para. 8, provides that, if the order there set out is applicable, the prescribed order may be varied in the manner prescribed by the will. This may be either by express provision or by implication. It is necessary, therefore, first E to consider whether the will contains provisions which prevent the application of Sched. I, Part II. The will provides that, "subject to the payment" of the various items specified, the testatrix devises and bequeaths :

F . . . all the rest and residue of any property of whatsoever kind or nature where; soever situate whether real or personal [to the two named persons in equal shares].

Since the primary liability of personal estate before real estate has been removed by sect. 32 of the Act, and realty and personalty are thereby placed on an equality, it follows that the provision referred to imposes a charge on the residuary personal and real estates in respect of the items G specified in such a way that those items must be borne by those estates rateably as between the persons beneficially entitled thereto. The presence of that charge is inconsistent with the payment of the items specified out of the lapsed share of the residuary personal and real estates, since that share can be ascertained only after effect has been H given to the charge imposed by the will. As already pointed out, the imposition of such a charge was held to be sufficient to effect a change in the order of administration applicable before the Act in question came into force, and we can see no valid reason why such a charge should not be sufficient to effect a change in the order of administration laid down in Sched. I, Part II, and, in the absence of any such reason,

we should have had no hesitation, apart from any binding decision to the contrary, in holding that the provisions of Sched. I, Part II, para. 1, have no application to the administration of the testatrix' estate.

However, there have been a number of decisions with regard to the application or otherwise of Sched. I, Part II, to the administration of particular estates. Our attention was called to the majority of these decisions which have recently been reviewed by SIMONDS, J., in *Re Sanger, Taylor v. North* (9). SIMONDS, J., stated that he found it difficult to distinguish between, on the one hand, a gift of property subject to and after payment of funeral and testamentary expenses or debts or legacies, and, on the other hand, a direction to pay funeral and testamentary expenses or debts or legacies followed by a gift of residue, and we feel some sympathy with him in his difficulty. It seems to us, however, that the two classes of case may properly be distinguished on the ground that in the first class there is an express charge of the specified items upon the subject-matter of the gift, while in the other class there is merely a direction to pay the specified items, unsupported by any charge express or to be implied. In *Re Kempthorne, Charles v. Kempthorne* (10), the provision which was held to displace the order of administration laid down by Sched. I, Part II, was in the following terms :

As to all my leasehold property and all my personal estate and effects including my stocks and shares and all money due to me on debentures and mortgages of or to which I shall be possessed or entitled at the time of my death subject to and after payment of my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil thereto and the duty on any legacies bequeathed free of duty the same shall be divided into seven equal parts and I bequeath the same as follows. . . .

Then followed the names of certain beneficiaries, some of whom predeceased the testator, with the result that there was a lapse in respect of the shares given to those who predeceased the testator. The crucial words in that will are "subject to and after payment of my funeral and testamentary expenses," etc. In the present case, the crucial words appear to be "subject to the payment of my funeral and testamentary expenses," etc. We feel unable to distinguish the words in *Re Kempthorne, Charles v. Kempthorne* (10) from those in the present case. The only difference is that in the former case the words "and after" are used in addition to the words "subject to," while in the present case the words "subject to" appear alone. Even if we had felt any doubt as to the decision in *Re Kempthorne, Charles v. Kempthorne* (10), we are satisfied that the difference between the words to be compared is so insignificant that we should have been bound to follow that decision, but we do not feel any such doubt. On the contrary, we respectfully agree with that decision, and follow it without hesitation. Of the other cases referred to in *Re Sanger, Taylor v. North* (9), it is sufficient to state that in *Re Lamb, Vipond v. Lamb* (8), in *Re Tong, Hilton v. Bradbury* (11), and in *Re Worthington, Nichols v. Hart* (7) there were no words which

could be construed as creating a charge of the particular items respectively in question on the residuary estate or any other property of the testator, while in both *Re Petty, Holliday v. Petty* (12) and *Re Atkinson, Webster v. Walter* (13), as in *Re Kempthorne, Charles v. Kempthorne* (10), such words of charge were present. It appears to us that the decision in
 A *Re Sanger, Taylor v. North* (9) falls into the same class as the decisions in *Re Lamb, Vipond v. Lamb* (8), *Re Tong, Hilton v. Bradbury* (11) and *Re Worthington, Nichols v. Hart* (7), respectively.

For these reasons, we are unable to agree with the decision of FARWELL, J., in the present case, and are of opinion that the declaration
 B made by him should be varied by striking out the declaration set out therein under heading (b), and substituting therefor the following declaration: “(b) that the funeral, testamentary and administration expenses and debts of the testatrix (including therein the debts and liabilities of the business of William Harland & Son) and the pecuniary
 C legacies bequeathed by her will and codicil and the legacy duty on legacies bequeathed by her said will free of duty ought to be paid and discharged out of the entire residuary estate of the testatrix, and that no part of the share of residue given by the will of the testatrix to Dr. Gibbons, who predeceased the testatrix, ought to be applied in
 D recouping to the plaintiff any part of the said funeral, testamentary and administration expenses debts pecuniary legacies or legacy duty.” With regard to the costs in the court below, we think that the order made by FARWELL, J., ought not to be disturbed, and that an order similar to that should be made in respect of the costs of this appeal.

E *Appeal allowed. Leave to appeal to the House of Lords.*

Solicitors: *M. Wilson Prentis*, agent for *Vaughan & Baker*, Kingston (for the appellant); *Lewis & Lewis* (for the respondent).

[Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.]

F

THOMAS & EVANS, LTD. v. MID-RHONDDA CO-OPERATIVE SOCIETY, LTD.

COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **November 12, 13, 1940.]**

G

Waters and Watercourses—Escape and overflow—Wall erected by riparian owner and local authority to protect land of riparian owner and highway—No right in adjoining owners to protection—Removal of wall and re-erection leaving gaps—Damage by flooding.

H

The appellants were lessees of land which stands upon the banks of the River Rhondda. The respondents own land at the back, and their land is separated from the appellants' land by a street. On Feb. 19, 1892, an agreement was entered into between the then owner of the land now occupied by the appellants and the local board, under which agreement a wall was erected along the river bank to prevent flooding. The then owners of the respondents' land were not parties to this agreement, which was entered into solely for the protection of the appellants' land and the adjoining highway. In 1939, the appellants obtained the

consent of the then owner of the freehold of their property to remove so much of the wall as abutted upon the land they occupied and to put in its place one wall of a building which they proposed to erect. The appellants started to erect their building, of which the front wall was a little less in length than the wall which they had demolished, gaps through which the workmen passed materials being left at either end. On July 8, 1939, the river rose rapidly in the night and the respondents' premises were damaged by floods. The county court judge found that the appellants had been negligent, and awarded the respondents £100 damages:—

HELD: (i) the respondents had no right to have the wall erected nor to insist on its continuance. The appellants, therefore owed no duty to the respondents, and could not be guilty of negligence.

(ii) the appellants were not liable either in respect of nuisance or on the principle laid down in *Rylands v. Fletcher* (1).

[EDITORIAL NOTE.] A riparian owner may erect works for the protection of his own lands from flooding, provided that he does not thereby occasion injury to the lands of others. Having erected the works, he is apparently under no liability to maintain them, unless a right to protection has been acquired by prescription. The position in the present case was perhaps a little complicated in that the local authority was a party to the erection of the defensive work, but this is held not to give adjoining owners any right to protection. It would be otherwise if the work was authorised by Act of Parliament for general protection against flooding, and, apparently, the position is not quite the same in the case of a tidal river.

FOR THE LAW ON THE POINT, see HALSBURY, Hailsham Edn., Vol. 33, p. 634, paras. 1124, 1125; and FOR CASES, see DIGEST, Vol. 44, pp. 58-65, Nos. 422-453.]

Cases referred to:

- (1) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 36 Digest 187, 311; 37 L.J.Ex. 161; 19 L.T. 220; *affg.* (1866), L.R. 1 Exch. 265; *revsg.* (1865), 3 H. & C. 774.
- (2) *St. Helen's Smelting Co. v. Tipping* (1865), 11 H.L. Cas. 642; 36 Digest 169, 115; 35 L.J.Q.B. 66; 12 L.T. 776; *affg.* (1864), 4 B. & S. 616.
- (3) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
- (4) *Sedleigh-Denfield v. O'Callagan (St. Joseph's Society for Foreign Missions Trustees)*, [1940] 3 All E.R. 349; Digest Supp.; *revsg.* S.C. sub nom. *Sedleigh-Denfield v. St. Joseph's Society for Foreign Missions*, [1939] 1 All E.R. 725.
- (5) *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co.* (1878), 9 Ch.D. 503; 36 Digest 101, 671; 39 L.T. 433.
- (6) *Smith v. London & South Western Ry. Co.* (1870), L.R. 6 C.P. 14; 36 Digest 29, 150; 40 L.J.C.P. 21; 23 L.T. 678.
- (7) *Sharp v. Powell* (1872), L.R. 7 C.P. 253; 36 Digest 27, 139; 41 L.J.C.P. 95; 26 L.T. 436.
- (8) *Re Polemis & Furness, Withy & Co.*, [1921] 3 K.B. 560; 36 Digest 29, 151; sub nom. *Polemis v. Furness, Withy & Co.*, 90 L.J.K.B. 1353; 126 L.T. 154.
- (9) *Hudson v. Tabor* (1877), 2 Q.B.D. 290; 7 Digest 290, 172; 46 L.J.Q.B. 463; 36 L.T. 492.
- (10) *A.-G. v. Tomkine* (1880), 14 Ch.D. 58; 36 Digest 187, 309; 49 L.J.Ch. 377; 42 L.T. 880.
- (11) *West Norfolk Farmers' Manure Co. v. Archdale* (1886), 16 Q.B.D. 754; 41 Digest 53, 382; 55 L.J.Q.B. 230; 54 L.T. 561.
- (12) *Jeffries v. Williams* (1850), 5 Exch. 792; 36 Digest 208, 501; 20 L.J.Ex. 14; 16 L.T.O.S. 196.

(13) *Brown v. Robins* (1859), 4 H. & N. 186; 19 Digest 169, 1180; 28 L.J.Ex. 250.

APPEAL by the defendants from an order of His Honour JUDGE CLARK WILLIAMS, sitting at Pontypridd County Court, dated June 22, 1940. The facts of the case are fully set out in the judgment of SIR WILFRID GREENE, M.R.

A 1. *S. Comyns Carr, K.C.* (for *Hartley W. Shawcross, K.C.*, on war service), and *Rowe Harding* (for *H. Edmund Davies* on war service) for the appellants.

B *P. E. Sandlands, K.C.*, and *Carey Evans* for the respondents.

Comyns Carr, K.C.: The county court judge found against the appellants, on the grounds that there was a common law duty to take care to prevent flooding and that the appellants had been negligent. The appellants were under no such duty, and there was no evidence of

C negligence. It would have been possible to have blocked up the gaps, but the fact that the appellants did not block them up does not prove that they were negligent. There was no reason to expect any flooding when the workmen ceased work on the previous evening. No such rise in the river had been known in recent years. The county court judge

D said that there was a duty on a riparian owner not to do anything which would remove an artificial barrier erected to prevent flooding. The appellants were entitled to rebuild, and the county court judge has held that in the course of rebuilding they have done something which shows a want of reasonable care. That, however, would result in no

E liability if there was no duty. A person whose land fronts upon a river is under no obligation to keep the river from flooding his neighbour's land. [Counsel referred to *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co.* (5), *Hudson v. Tabor* (9), *Rylands v. Fletcher* (1), *A.-G. v. Tomline* (10) and *West Norfolk Farmers'*

F *Manure Co. v. Archdale* (11).]

Sandlands, K.C.: In *West Norfolk Farmers' Manure Co. v. Archdale* (11), negligence was not pleaded. It is not suggested that there is any liability upon an owner of land adjacent to a river to build a wall to protect his neighbour's land. The circumstances must be looked

G at in every case, and, if there has been a breach of duty, a defendant will be liable. In the present case, the appellants were bound to take care in rebuilding their premises, so as not to injure their neighbours. The wall in question was built as a protection to members of the public using the highway. Therefore, the public on the highway were entitled

H to protection. If there had been no wall at all, the water would have flooded over, but it would not have come through gaps, and it might well have been that none of it would have reached the land of the respondents. The appellants, however, dammed up the river in such a way that water and mud escaped and damaged the respondents' premises. The county court judge has found that the appellants had a licence to

pull down and to rebuild the wall only provided that they did so in a proper workmanlike manner. To build a wall and leave gaps in it, as the appellants have done, is not a natural user of the land. The appellants were authorised to pull down only so much of the wall as was necessary for the rebuilding of their premises. However, they pulled down more of the wall than that, and to that extent they were trespassers. In *Sedleigh-Denfield v. O'Callagan* (*St. Joseph's Society for Foreign Missions Trustees*) (4), the defendants suffered to be laid on their land, adjacent to the plaintiff's land, a 15-in. pipe with an unprotected orifice, and it was held that that was a nuisance. The principle of *Rylands v. Fletcher* (1) applies to the present case, because the appellants' act in taking down the wall and rebuilding it in the way in which they have done, leaving gaps which allowed water to enter, was a non-natural user of the land. As far as negligence is concerned, the *de facto* protection of this wall was interfered with by the appellants. They ought to have known that the result of that interference would be likely to cause damage unless proper protection was given, and they ought to have taken precautions to prevent damage from resulting. As regards nuisance, the appellants had pulled down the wall unlawfully and without proper excuse. They had to remove and re-erect the wall in a proper and workmanlike manner. The landlord's consent was given on condition that the work was so done. The failure of the appellants to carry out the work in a proper and workmanlike manner has resulted in damage to the respondents' premises. The judgment of the county court judge could also be supported on the principle of *sic utere tuo ut alienum non laedas*. In the circumstances of the present case, there was a duty to take care. [Counsel referred to *St. Helen's Smelting Co. v. Tipping* (2), *M'Alister (or Donoghue) v. Stevenson* (3), *Hudson v. Tabor* (9), *Jeffries v. Williams* (12) and *Brown v. Robins* (13).]

Counsel for the respondents were not called upon in reply.

SIR WILFRID GREENE, M.R. : In the action out of which this appeal arises, the respondents, the plaintiffs, were seeking to recover damages from the appellants, the defendants, in respect of damage caused to their property by an incursion of water into it which came from the River Rhondda by way of the appellants' premises. The appellants are lessees of land which stands upon the bank of the River Rhondda. The respondents own land at the back, there being between the two premises a street called Porth Street. It appears that the River Rhondda is a river which in the past has been liable to overflow, and, in view of that circumstance, and in view of the damage and inconvenience caused to the highway of Porth Street, on Feb. 19, 1892, an agreement was made between the then owner of the land now occupied by the appellants and the local authority. That agreement, which was between one Idris Williams and the local board, provided for the grant to the board of the right to erect a defensive wall upon the site specified in the agreement

and described upon the plan. Various ancillary rights were given in the matter of repair and so forth, the cost of which was apportioned between Idris Williams and the board, and Idris Williams undertook not at any time thereafter to

A . . . pull down or remove such wall or any part thereof unless and until he shall have previously erected on the said land substantial buildings which would have the effect of preventing floods or demand or require the board to pull down or remove such wall or any part thereof.

The object of the wall was twofold. It would be a protection for the property of Idris Williams and also a protection for the highway. I need not refer in detail to the title of the appellants. By assignment, B they are the holders of a lease granted by a successor in title to Idris Williams.

In 1939, the appellants were minded to reconstruct certain buildings which existed on the site, and, in order to do that, they proposed to get rid of part of the wall and substitute in its place the front wall of a C building which, from the photograph, appears to be a two-storey building. That front wall would operate as a river-wall in the same way as the wall constructed under the agreement of Feb., 1892, had done. The actual site of the original wall lay outside the boundary of the land comprised in the lease held by the appellants, and, accordingly, in order D to carry out this part of their operations, they required the consent of the freeholder, who, of course, was their lessor, before they could interfere with the wall, which did not lie on their premises, or construct the building along the building line which they contemplated. Accordingly, they obtained from the lessors' agent an authority in the following E words :

On behalf of the lessors of the above premises I hereby grant consent to the Mid-Rhondda Co-Operative Society, Ltd., to make such alterations to the said premises and the erection of additional premises as was shown by the plans submitted for my approval.

The plans in question show this particular new building along the line F of the old wall. In terms, of course, that is a licence which, for all practical purposes, had the effect of throwing that part of the strip of land on which the wall was built into the lease which the appellants held. The appellants proceeded to start their operations, and, in the course of them, they pulled down a length of wall. They started to erect the G front wall of their new building, which was slightly smaller in extent than the actual stretch of wall which they had demolished. I think that the demolition extended on the one side some 2 ft. 6 ins. beyond the actual line of the new building, and a few inches on the other side. Their plan was, of course, to fill up those gaps by building a wall across H them, but, at the relevant time, when the events occurred giving rise to the present claim, they had not actually filled up those gaps by erecting the short stretch of wall necessary for the purpose. They had used the gaps in the course of their building operations, and they used them to pass materials through on to the bit of land lying between the actual edge of the water at that season and the new building itself.

Unfortunately, on the night of July 6, 1939, as the result of very exceptional rains, the River Rhondda was swollen. It rose very rapidly during the night, and penetrated through the gaps which existed at the sides of the new building. Thence it reached the yard in the appellants' premises, and from there it crossed the road and came into the respondents' land, where it did the damage which is complained of. A

In those circumstances, the present action was launched, and it resulted in a judgment for the respondents for the sum of £100, as to which figure there is no dispute. The county court judge took the view that, by leaving those gaps in the course of their operations, the respondents had been guilty of negligence, because apparently they B ought so to have arranged their operations as to leave a protection at those points which would prevent the flood water, if it should come, from getting into the land at the back. He found that, upon the evidence before him, the sudden rise in the river was a thing which ought in reason to have been anticipated, and precautions ought to C have been taken to deal with it. In my opinion, he was wrong in the decision to which he came. The fault in his judgment—if I may so describe it without disrespect to him, because it is a matter to which he had obviously given very careful attention and consideration—lies in the fact that at the outset he set himself to examine the conduct of D the appellants without considering what is vital in matters of negligence—namely, the right, if any, of the respondents to call for the exercise of the measure of care which he found was appropriate to the situation. If he had approached the matter from that angle, I cannot help thinking that he would have seen at once how very far-reaching was the decision E to which he was coming. At the outset, it is abundantly clear, and the county court judge took the same view, that the agreement between Idris Williams and the local board was not a thing which could, on any view, confer any right whatsoever upon the respondents. As far as they were concerned, it was *res inter alios acta*, creating mutual rights F and obligations between the parties to the agreement and, presumably, the successors in title of Idris Williams, but not enuring for the benefit of any third person at all. Therefore, it was impossible for the respondents to base any claim upon that document, and counsel for the respondents before us did not attempt to do so. G

That being the position, the case can be conveniently considered by taking, first of all, the position as it would have been if the demolition of the wall had been carried out by the freeholder, he being, for the purpose of this consideration, in occupation of the premises. The wall had been constructed upon his land under an agreement with the local H board, under which they were entitled to object to his removing it. He agrees with the local board that, for certain purposes, he shall be entitled to remove it, and he does remove it. What right can that possibly give to the respondents? They had no right to call upon Idris Williams or anybody else to erect a wall upon this land for the purpose of pro-

- testing their property. If Idris Williams, for his own purposes, with or without the assistance and co-operation of the local board, chose to erect such a wall, on no principle of law known to me would a third person be entitled to insist on its continued existence. If this wall had been erected by the freeholder and taken down by him the next day, or a week or a year afterwards, with the result that the floodwater took the course which it would have taken if the wall had never been there. I cannot see, on any principle known to me, that the respondents would have been entitled to complain. If it were not so, in putting up a defensive work on his own land, a person would act at his peril, because, by the mere fact of erecting it, he would be conferring upon his neighbours, or persons in the neighbourhood, rights to insist that he should never remove the wall or building which he had put up. Such a doctrine, in my opinion, finds no support in any principle of our law. If the county court judge had considered the implications of his decision, and had approached the matter from the angle of the rights of the respondents rather than from the angle of the alleged carelessness of the appellants, I cannot help thinking that his decision would have been different from what it was.

- Then it is said that the taking down of that part of the wall where the gaps in question existed was not an act done by a freeholder or by a person lawfully entitled to do those acts, and that the appellants, in taking down those stretches of the wall, were really acting as trespassers. The ground upon which that argument is based is the suggestion that the licence of Mar. 21, 1939, which I have read, did not, upon its true construction, and read in relation to the plans and applied to the actual operations of the appellants, extend to the taking down of those bits of the wall which, as I have already pointed out, were beyond the actual area covered by the wall of the new building.

- A case of that kind, if, indeed, its establishment would have altered the position, was one which ought to have been pleaded, and ought to have been supported by evidence. Nothing that I say is to be taken as expecting, in cases such as these, any undue attention to the form of pleadings, but in the present case I take note of the fact that no such case was made at the trial. There is not a suggestion from beginning to end of the county court judge's judgment that any such suggestion was made, and there is no finding of fact by him—and findings of fact would have been necessary—which bears upon the matter. Indeed, if the language which he uses in relation to these gaps at the outset of his judgment is read in its normal and obvious sense, he is quite clearly treating the whole of the demolition of the wall which was carried out by the appellants as something which they were doing in the proper execution of their work and in accordance with the terms of their licence. Accordingly, in my opinion, that point is one upon which the respondents cannot rely.

I may add that it seems to me that, had they wished to put forward

a case of that kind at the trial, they would have had very great difficulty in doing so, because a licence of this sort must obviously extend to any normal and reasonable building operation required for the purpose of carrying into effect the works shown on the plans referred to. Nothing which I have heard in the course of this case suggests to me that, from the point of view of construction, anything which was done by the leaving of those gaps was in any way unreasonable or outside the reasonable meaning of the licence. That being so, the appellants must be treated in this case as persons who, with the licence of the freeholder, the owner of the wall and the owner of the site of the wall, have removed that wall or part of it, and they stand in precisely the same position as the freeholder himself. The respondents would have no more right to complain of the action of a licensee of the freeholder in taking down that wall, or part of it, than they would have the right to complain if the freeholder had done it himself. So much for the case as based on negligence. A

Counsel for the respondents also endeavoured to rest his case upon the well-known principles of *Rylands v. Fletcher* (1) and upon nuisance. In my opinion, neither of those grounds is open to him. The argument as based on the principles of *Rylands v. Fletcher* (1) involved the proposition that, in taking down those portions of the wall and so creating these gaps, the appellants were doing something which was a non-natural user of their land, the effect of which was to allow the river-water to enter the land, and thence to escape on to the respondents' land. When this proposition is analysed, it really contains precisely the same defect as does the argument based on negligence, because it is asserted that the removal of a wall which has been built by the owner of property on his own land for his own purposes is a non-natural user of his land. The only ground for saying that it is a non-natural user is that the particular "user" would damnify, or might damnify, the defendants. That again implies that the respondents had some right to complain of this particular user of the land, or, in other words, that, the wall having once been erected, they would be entitled to interfere with any subsequent operations which had the effect of removing their protection. That is all I propose to say on that branch of the argument. D

In the argument based on nuisance, counsel for the respondents submitted that, in pulling down this wall without proper excuse, the appellants caused water to flow on to their own premises, that it ought not to have been there, and that it escaped thence to the damage of the plaintiffs. He said that the presence of the gap was an artificial work, and, by means of that artificial work, water was allowed to escape in the way in which it did. I am afraid that the conception of these gaps as artificial works is one which my mind is unable to grasp. The assertion that the appellants pulled down the wall unlawfully—namely, without proper excuse—really begs the whole question in its broader meaning. Counsel for the respondents also gave to that phrase which E F G H

- he used a narrower meaning, related to the alleged trespass by the appellants in exceeding the terms of their licence in the same way as it was alleged they had exceeded it under the argument based on negligence. I have already dealt with that, and I do not propose to add anything to what I have already said, but why the pulling down of the
- A wall was unlawful I am afraid I am unable to appreciate. On one or other of his arguments—I am not quite sure whether it relates to one or to more than one of them, but it does not matter—counsel for the respondents endeavoured to suggest that the existence of these gaps, or the existence of what was left of the wall, or rather, what took the place
- B of the wall, coupled with the gaps, had in some way caused the flood-water to flow in a direction or volume in which it would not otherwise have flowed. He suggested that the real complaint might be that the appellants had placed an artificial obstruction, or maintained an artificial obstruction, on the banks of the river, consisting of the front of their
- C new building, which, when taken in conjunction with the gaps, caused water to flow in a way in which it would not otherwise have flowed. If any such case could have been made, it would have been a case on which evidence would have been required. It was not suggested that there was a particle of evidence in support of it, and, without having
- D the necessary evidence before it, it would be quite impossible for this court, or for any other court, to decide a matter which is fundamentally a matter of fact. I accordingly dismiss that point.

- In the course of his argument, counsel for the respondents referred to a range of authorities, stretching from *St. Helen's Smelting Co. v. Tipping* (2) to *M'Alister (or Donoghue) v. Stevenson* (3), and from *Rylands v. Fletcher* (1) to *Sedleigh-Denfield v. O'Callagan (St. Joseph's Society for Foreign Missions Trustees)* (4). I do not find in the general observations which he culled from some of the judgments and opinions in those cases anything which assists me to accept any of his arguments.
- F The general observations in question must, of course, be read in the light of the facts of the cases to which they related. As it seems to me, the simple ground for deciding this case is that the respondents had no right to have the wall erected. They had no right to insist on its continuance. They had no ground of complaint whatsoever against any-
- G body who rightfully took it down, and the appellants in this case rightfully took it down under their licence from their freeholder.

- There is one other matter to which I should refer. The county court judge placed great reliance on *Nitro-Phosphate & Odam's Chemical Manure Co. v. London & St. Katharine Docks Co.* (5), a case which
- H related to a tidal river. There had existed a sea-wall, which was, if not put up, at any rate, maintained, under the jurisdiction and directions of a board of commissioners, and that board had prescribed a height of 4 ft. 2 ins. as the minimum height for the wall. There is no question that the commissioners had jurisdiction and power so to prescribe, and anyone who removed that wall, or reduced its height, with the result

that private persons were injured in their property, would be liable to an action. The dock company, in point of fact, obtained a private Act of Parliament under which their docks were constructed, and they made a cut in the wall and led the river and tidal water into a basin which they constructed at the back. The height of the walls which they put up was insufficient to keep out a particularly high tide, and was, I think, even lower than the height of 4 ft. which the private Act prescribed, and certainly lower than the height of 4 ft. 2 ins. which the commissioners had prescribed for the sea-wall, part of which they had taken down in connection with their works. The decision in that case was based, in the first instance, on the legislative provision and the directions of the commissioners, but there are certain observations in the course of the judgment which suggest that, quite apart from those matters, there would have been a liability at common law upon the defendants, the dock company, for removing the wall and not providing a proper substitute for it. I find those observations difficult to follow, but it has to be remembered that the case with which this court was dealing there was the case of a tidal river. In the case of tidal rivers, the Crown had the prerogative right—and, indeed, the duty—to protect the realm against incursions of the sea. That was a duty which lay upon it, and which it performed for the benefit of the King's subjects. The execution of that duty came to be transferred to boards of commissioners, and I apprehend that, if the King, or the commissioners, duly acting, erected a wall, or required the erection of a wall, for the general protection of the public, and some person, without just excuse, removed the wall, with the result that members of the public had their property damaged, an action would lie at common law against the person who did that act. It may be that the references to a right of action at common law relate to that aspect of the matter. I find it difficult, as I have said, to see exactly what the common law claim was thought to be, but, however that may be, after very carefully considering the judgment in that case, I can find nothing in it which affords support for the proposition that, where the riparian owner of land on a non-tidal river erects a wall for his own purposes for the protection of his own land, a person owning land behind him is entitled to require that he shall never thereafter remove it, or any part of it. In the result, the appeal succeeds, with costs here and below.

CLAUSON, L.J.: I find myself in complete agreement with the results reached in the judgment of SIR WILFRID GREENE, M.R., and in the steps by which the result is reached, and I therefore propose to add nothing.

GODDARD, L.J.: I agree, and, in deference to the argument of counsel for the respondents, I should just like to say one word. If A, a riparian owner, with property on the banks of a river, builds a wall

- which is designed to keep out flood-water, it may very well be that it enures to the benefit, not only of A, but also of B, his neighbour. However, B, of course, gets no right as against A to have that wall maintained, because he has no right to have his property protected unless he can get it either by way of grant from A or by prescription. Nevertheless, if a wrongdoer, C, comes along and either deliberately or by careless navigation or something of that sort knocks down the wall, so that there is an escape of water over A's land on to B's land, it may be that B will have an action against C. It may be—I am not deciding it—that the duty there would arise from what LORD ESHER would call proximity, and we should no doubt have to consider the bearing on such a state of facts of such cases as *Smith v. London & South Western Ry. Co.* (6) and *Sharp v. Powell* (7), and of the more modern doctrine laid down in *Re Polemis & Furness, Withy & Co.* (8). In this case, we are bound to assume that the defendants were doing what they were doing under the licence, and with the complete acquiescence, of the owner of the wall. That being so, as the owner of the wall could not have been under any liability if he had taken down the wall, the licensee cannot be sued, and I agree that this appeal succeeds.

Appeal allowed with costs in both courts.

- Solicitors: *Smith, Rundell, Dods & Bockett*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the appellants); *Helder, Roberts, Giles & Co.*, agents for *W. R. Davies & Co.*, Pontypridd (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

E MILLER v. LIVERPOOL CO-OPERATIVE SOCIETY, LTD., AND OTHERS.

[LIVERPOOL AUTUMN ASSIZES (Stable, J.), **November 1, 1940.**]

- F *Negligence—Highways—Collision at cross-roads during black-out—Excessive speed—Duty to minimise inherent risk of operation.*

- The plaintiff was injured while he was a passenger in a lorry owned by H. and driven by his servant and agent. The plaintiff had not received the express permission of H. to ride in the lorry on this occasion, but he had done so on a number of previous occasions without any exception being taken by H., who had acquiesced in what had become an established practice. At 5.40 a.m. on Jan. 22, 1940, during the black-out, while the lorry was being driven along a main road at about 25 m.p.h., it collided with a milk-lorry owned by the L.C.S., Ltd., which was at the time emerging from a side road into the main road, and which at the moment of impact had practically completed the turn. The milk-lorry was an articulated vehicle 30 ft. in length, and there was a certain time during the turn when it would be virtually broadside on across the line of main-road traffic and at that time invisible to a vehicle approaching with regulation lights. It carried regulation lights, and, in addition to the driver, there was a mate, who, however, remained on the vehicle. The plaintiff sued the owners of both vehicles for damages for negligence:—

HELD: (i) the plaintiff was a passenger in the lorry with the leave and licence of H., and was, therefore, a licensee and not a trespasser.

(ii) the driver of H.'s lorry was negligent, in that he was travelling at too great a speed in the black-out.

(iii) the driver of the milk-lorry was negligent in failing, before entering the main road, to put the mate off the lorry and on to the main road to give warning either to him or to an oncoming vehicle. Having regard to the inherent risk of driving in the black-out, it is incumbent on all concerned in such operations to take such steps as are reasonably within their power at least to minimise what must remain a considerable risk. A

(iv) the plaintiff was entitled to succeed as against both defendants, and the apportionment of damage would be 80 per cent. as against H. and 20 per cent. as against the L.C.S., Ltd.

[EDITORIAL NOTE.] The black-out conditions necessitated by the war have inevitably given rise to numerous motoring problems. To drive a vehicle during the black-out is an operation which must involve a considerable degree of danger to other road-users, but, since it is permitted by law, the operation is not in itself a tort. The question of whether or not it is a tort depends, not upon what is done, but upon the manner of its doing, and, since there is an inherent risk in the operation, there is a duty on all concerned to minimise that risk as much as possible. In this case, a reasonable precaution would have been to let the mate get off the milk-lorry and guide it into the main road or warn other road-users of the danger. A failure to take this step was, in the circumstances, held to be negligence. It will be noticed that the court has drawn attention to the regulation prohibiting the sounding of horns between certain hours of the night, and has suggested that this provision might well be modified in view of present conditions. B C

AS TO NEGLIGENCE IN REGARD TO HIGHWAYS, see HALSBURY, *Hailsham Edn.*, Vol. 23, pp. 639,640, paras. 899, 900; and FOR CASES, see DIGEST, Vol. 36, pp. 59-63, Nos. 366-405.] D

ACTION for damages for personal injury sustained by the plaintiff as the result of the alleged negligence of the defendants. In the early hours of Jan. 22, 1940, the plaintiff was a passenger in a lorry owned by the second defendant and driven by the third defendant. He was not a passenger for reward, nor even with express permission, but was in fact receiving a lift. A vehicle belonging to the first defendants, a milk-lorry some 30 ft. long, was crossing the thoroughfare along which the plaintiff was travelling when the collision occurred in which the plaintiff was injured. Statutory regulations prevented the sounding of horns, and more recent statutory regulations prevented the use of normal lighting. E F

E. G. Hemmerde, K.C., and *B. J. Rice-Jones* for the plaintiff.

G. J. Lynskey, K.C., and *C. H. Spafford* for the first defendants. G

F. Raleigh Batt for the second and third defendants.

STABLE, J.: This is a case which has certain points of interest in it. The plaintiff was a passenger in a lorry which belonged to Hughes and was driven by Hawken. At 5.20 a.m. on Jan. 22, 1940, the plaintiff was being driven in this lorry along Prescott Road in the direction of Liverpool. When the lorry was more or less opposite Lockerbie Road, which comes in from the near side, there was a collision with a lorry which belongs to the Liverpool Co-operative Society, and Miller, the plaintiff, was injured. The defendant Hughes says: "Assuming that the H

- negligence of my driver was responsible for the accident, or was one of the causes of the accident, I am not liable, because Miller had no business to be travelling on my lorry. I never told him that he might, and I did not know that he was there. He was trespassing on my lorry, and I do not owe him a duty." In my judgment, Miller was not a trespasser on
- A the lorry. He was there with Hughes' leave and licence. It is quite true that express permission had never been given, because, in matters which are so obvious in everyday life, we do not give express permission, but I accept Miller's evidence on this matter that for months, probably for years, he had been in the habit of waking up Hawkens, who drove
- B the lorry, and Hawkens gave him a lift on the lorry to the place where they worked. Miller says that Hughes knew that perfectly well, had seen him on a number of occasions, had not taken the slightest exception to it, and had acquiesced in what had become an established practice. That evidence I accept. That being so, the defence that Miller was
- C a trespasser fails as far as Hughes is concerned. Hawkens was engaged on Hughes' business in driving this lorry as his agent, and, accordingly, he had a duty to everybody to exercise due care and skill, a duty which is higher in the case of the ordinary third party—an invitee or licensee—who is travelling on a car, than it is in the case of a person who is tres-
- D passing on a car, and who is there without authority or permission. Between the trespasser and the licensee I know of no intermediate class, and Miller falls into one class or the other. In my view, it is quite plain that he was there with Hughes' knowledge and acquiescence and was a licensee.
- E As regards the negligence of Hawkens, it seems to me that nothing could be plainer, on Hawkens' own admission. He says that the lorry was going at about 15 m.p.h. to 20 m.p.h. Miller puts it at about 25 m.p.h. I have little doubt that the lorry was doing a great deal more than 15 m.p.h., and Hawkens, who was driving the lorry, said: "I
- F could not have pulled it up at that pace, in view of the conditions of the road." He said: "I could not have pulled the thing up in 5 yds." I do not think that he could.

- What happened was that it ran into the first defendants' articulated vehicle, which was coming out of a side road and which for a matter
- G of some seconds was pretty well broadside on across the highway. As an indication of what these black-out conditions really are on the high road, not one of those four men on the two vehicles had the slightest idea of the presence of the other until within a split second of the crash. Those facts make it an impossible task for any advocate to attempt to
- * H argue that that pace alone does not constitute negligence.

The case of the Liverpool Co-operative Society, Ltd., is far more difficult. This large articulated vehicle, which means a vehicle with a sort of join in it, had picked up its load of milk-bottles in crates in the dairy in Lockerbie Road. The milk, as we know, has to be delivered early in the morning, and the route of the vehicle lay pretty well due north up

Lockerbie Road followed by a turn into Prescott Road, a main highway. As regards the lights it carried—these matters are prescribed by the regulations—the evidence here is that the lights were in accordance with the regulations. I have no doubt that to get out of Lockerbie Road and to turn to the left into Prescott Road at 5.20 a.m. on a pitch black morning in January, under black-out conditions, is an operation which inevitably A and inherently is, and must be, one involving considerable risk. Of course the risk could be obviated if one had a battalion of guardsmen, a few fire engines and police drawn up in cordons across the road. Even then, there is always the possibility that one might be run over. However, one cannot approach these matters in a fantastic light. Taking B things as one finds them, in my view, that operation must involve considerable risk, because for a matter of many seconds the vehicle must be broadside on across the line of traffic approaching from the east. I need not labour the point in detail, but it is obvious that, with one of those articulated vehicles, in order to make a turn, one must get right out into C the road, so that the tail of the vehicle does not begin to turn until the rear of the vehicle is pretty well clear of the corner it has to get round. This vehicle is 30 ft. long, so that there must be quite a considerable time when it is virtually broadside on across the line of traffic. As the evidence goes to show, under certain conditions at night, when it is D in that position, for all practical purposes it is absolutely invisible to a vehicle coming along with the regulation lights. In the same way, the approach of a vehicle is never seen by the driver of this milk-lorry. One has to approach these black-out cases with some degree of caution, because, in my view, it cannot be said that a man is negligent, and E that he is committing a tort, simply because he performs an operation which the law allows him to do, although that operation must involve a considerable degree of danger to other people. That is not a tort, where the permissible operation is dangerous. The question of whether or not a tort has been committed must depend, not on that which was F done, but on the manner in which it was done, and I have to ask myself here whether or not what the driver—and I include the mate—did or omitted to do in this case was negligent. I am quite satisfied that the driver is a most competent, conscientious and careful man, and no fault could be found with his exit from Lockerbie Road or with the manner G in which he drove the lorry and so on. I should have held that, in an operation of this kind, taking all the facts into consideration, it was absolutely essential that a horn should be sounded, and sounded often and loudly, but it is impossible to hold that, because I have been referred to regulations making it illegal, at the hours and in the conditions H prevailing on this occasion, to sound a horn or anything like a horn from a motor vehicle at all, with certain exceptions connected with fire engines and the like which do not apply. I venture to think that that is a matter which, with these lorries on the highway at night in large numbers, the authorities might reconsider. It is impossible, in

my view, to say that this driver committed a tortious act because he omitted to do that which the law says he must not do, and I acquit the driver completely of any omission on that score. I am bound to say, however, that, having regard to the inherent risk of this operation, in my judgment, it is incumbent on all concerned to take such steps
A as are reasonably within their power at least to minimise what must remain a considerable risk.

In this case, there was present on this lorry a mate, and, in my view, it was negligence, having regard to all the circumstances, to debouch on to this main road under those conditions of darkness without getting
B the mate off the lorry and on to the pavement to the east to facilitate the operation either by a warning to his own driver or by a warning to any oncoming vehicle. The warning might be by lamp or by voice, or it might be by both. It may be that, in setting that standard of care in the circumstances which existed in this case, I have adopted a standard
C which is higher than that which the law requires. If I have, the matter can be corrected, but, on that ground, and for that reason, in my view, the plaintiff has established a cause of action for negligence against the first defendants. In my view, the apportionment is 80 per cent. as against Hughes and Hawkens and 20 per cent. as against the Liverpool
D Co-operative Society, Ltd. It is quite impossible to find as a fact, and I do not find as a fact, precisely where the lorry was at the time of the collision. Nobody knows, and there is no evidence before me which enables me to fix with precision where the collision took place. All I can ascertain is the places where the vehicles came to a stop, which is
E not by any means the same spot as that where the collision took place, more particularly as one vehicle was in one place and the other was in another. At the actual moment of the collision, the articulated vehicle, the milk-lorry, had virtually completed its turn out of Lockerbie Road into Prescott Road. That is as near to it as I can get. Like black-
F out drivers, I cannot perform miracles, and it is no good inventing facts and saying that I find facts. It must remain a matter of conjecture.

Judgment for the plaintiff for £684 18s. 9d. including £134 18s. 9d. special damage.

Solicitors: *Silverman & Livermore* (for the plaintiff); *W. Stanley Eastburn* (for the first defendants); *Barrow-Sicree, Saffer & Co.* (for the second and third defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

Re POINTER, POINTER AND ANOTHER v. EDWARDS AND OTHERS.[CHANCERY DIVISION (Morton, J.), **October 22, 1940.**]

Wills—Family provision—Wife's will not providing for husband—Legacy to daughter—Daughter married and under disability—Maintenance under Act—Termination—Marriage or cesser of disability “whichever is the later.”—Inheritance (Family Provision) Act, 1938 (c. 45), s. 1 (1), (2). A

By her will, dated Mar. 30, 1938, the testatrix, who died on Dec. 7, 1939, gave to her daughter a legacy of £1,000. The balance of the estate was given to her granddaughter or her issue, and, failing them, to the daughter. The estimated total net estate was £15,849. The daughter was separated from her husband, and received no maintenance from him or from her 3 children, and, owing to a physical disability, was unable to exercise her profession of a pianist. The testatrix was separated from her husband by deed in 1895, and her will made no provision for him. He was a retired schoolmaster, over 80 years of age, and of small means. The husband and daughter made application under the Inheritance (Family Provision) Act, 1938, for reasonable provision for maintenance out of the testatrix's estate :— B C

HELD : (i) both of the applicants were dependants within the meaning of the Act. The husband came within the terms of sect. 1 (1) (a), and the daughter came within the terms of sect. 1 (1) (b), since, by reason of physical disability, she was incapable of maintaining herself.

(ii) reasonable provision for the husband would be the income of one-fifteenth of the residuary estate, or the sum of 5s. per week, whichever was the smaller, to be paid to him during his life, or until his re-marriage. The daughter should receive the income of one-fifth of the residuary estate after deduction of income tax, or 30s. per week, whichever was the smaller. Payment would be made for her life, with a proviso for termination on the cesser of her physical disability. She must undertake to credit the trustees with any rebate on account of income tax, and there would be a condition that she must inform the trustees if she received at any one time a sum in excess of £200 from any source. D E

[EDITORIAL NOTE.] The Inheritance (Family Provision) Act, 1938, s. 1 (2) provides that an order for payment of maintenance shall be by way of periodical payments of income, and shall provide for the termination of the payments **not later** than, in the case of a daughter who has not been married, or who is under disability, her marriage or the cesser of her disability, whichever is the later. These words fit the case of a daughter who is not married and is under a disability, but they do not seem to fit the case of a daughter who is married and is under a disability, as is the case here. The court, while finding the words “whichever is the later” difficult to construe, has reached the conclusion that, on a reasonable interpretation of the provision for cesser, the payments must cease on the cesser of the disability. The opinion is also expressed that, in the case of a daughter who is unmarried and not under disability, the payments would cease on her marriage, and that, in the case of a daughter being left a widow and remarrying, the provisions of sect. 4, providing for variation of the order, would apply. It is difficult to see the purpose for which the words “whichever is the later” have been added to the subsection, as they do not seem to be capable of any sensible construction. On the question of provision for the husband, this decision may usefully be compared with *Re Silvester, Silvester v. Public Trustee*, [1940] 4 All E.R. 269; Digest Supp., where the court stated that, *prima facie*, a husband should be able to maintain himself, and, apart from exceptional circumstances, should not make application to the court for further provision out of his wife's estate. There, as here, circumstances could be found to justify such an application. F G H

AS TO PROTECTION OF TESTATOR'S FAMILY, see HALSBURY, Hailsham Edn., Vol. 34, pp. 439-445, paras. 486-505.]

A ADJOURNED SUMMONS under the Inheritance (Family Provision) Act, 1938, by Charles Benjamin Pointer and Ada Ellen Shonfeld, the husband and the daughter, respectively, of Alice Julia Pointer, the testatrix, applying for an order that such reasonable provision as the court thought fit should be made out of the estate of the testatrix for their maintenance. The summons was issued pursuant to R.S.C., Ord. 54F, r. 1. The will of the testatrix was dated Mar. 30, 1938, and a codicil was added on Oct. 30, 1938. She died on Dec. 7, 1939, and the will was proved on Feb. 16, 1940. The testatrix had left her husband about 1893. B a deed of separation, dated Oct. 2, 1895, was entered into by both parties owing to the unhappy differences which had arisen between them, and by that deed the husband had the custody and maintenance of the children, and allowed the testatrix £1 per week. There were two children C of the marriage—namely, the second plaintiff, Ada Ellen Shonfeld, and a son, George Pointer, who died in 1919, leaving a widow, Ethel Annie Pointer, who was one of the executors and trustees of the will and the third defendant to the summons, and a child, Joan Nancy Pointer, aged 21 years at the date of summons, who was the principal beneficiary under D the will and the fourth defendant to the summons. The first two defendants were the remaining executors and trustees of the will, Charles Edwards and Stanley Cecil Theophilus. The husband, the first plaintiff, was a retired schoolmaster, aged 83, and he had an income of about £330 per annum. The second plaintiff, the daughter of the testatrix, E was separated from her husband owing to the latter's drunkenness, and she did not receive any maintenance either from him or from her three children, all of whom were married. Owing to a physical disability, she could not exercise her profession of a pianist, and acted as a housekeeper to a friend of her father's in return for her board and lodging. F About a year before she died, the testatrix went to live in the house where her daughter, the second plaintiff, was acting as a housekeeper, and she contributed towards the upkeep of the establishment. She promised this daughter the moneys on deposit in the bank, but in fact there were none at the time of the testatrix' death, although there had G been a considerable sum at the date when she made her will. All the relevant clauses of the will are set out in the judgment.

F. C. Watmough for the plaintiffs.

F. S. Laskey for the first three defendants.

H. B. Vaisey, K.C., and *W. T. Elverston* for the fourth defendant.

H MORTON, J.: This is an application by the widower and by the only daughter of a testatrix who died on Dec. 7, 1939. The estimated total net estate, within the meaning of the Inheritance (Family Provision) Act, 1938, is, after deducting what seems to be a very generous estimate of £1,000 for testamentary expenses, £15,849.

By her will, dated Mar. 30, 1938, the testatrix appointed the first three defendants to be executors and trustees. She gave to her daughter the plaintiff Ada Ellen Shonfeld:

... the sum of £1,000 and in addition thereto all moneys standing to the credit of any deposit account of mine with my bankers at the date of my death.

I pause there to say that there was a sum standing to the credit of the deposit account at the date of the will, and on Jan. 11, 1939, that sum was just over £1,000, but it was subsequently invested by the testatrix, so that nothing passed to the daughter under that particular gift. Then, after a provision which is immaterial, the will continues as follows:

I devise and bequeath all the real and personal property whatsoever of or to which I shall be seised possessed or entitled at my death or over which I shall then have a general power of appointment or disposition by will except property otherwise disposed of by this my will or any codicil hereto unto my trustees upon trust to sell call in collect and convert into money the said real and personal property at such time or times and in such manner as they shall think fit with full power to postpone the sale calling in or conversion of the whole or any part or parts of the said property during such period as they shall think proper and to retain the same or any part thereof in its present form of investment without being responsible for loss. 6. My trustees shall out of the moneys to arise from the sale calling in and conversion of my said property and all other moneys forming part of my residuary estate pay my funeral and testamentary expenses and debts and the legacies given by this my will or any codicil hereto and all death duties and other moneys which under or by virtue of any direction or bequest free of duty contained in this my will or any codicil hereto are payable out of my general personal estate. 7. My trustees shall hold the residue of such moneys and all parts of my estate for the time being unsold upon trust for my granddaughter Joan Nancy Pointer absolutely if she shall attain the age of 25 years but if she shall not live to attain a vested interest therein my trustees shall hold the same upon trust for all or any of the children or child of the said Joan Nancy Pointer living at the date of death of the survivor of myself and the said Joan Nancy Pointer who being male attain the age of 21 years or being female attain that age or previously marry and if more than one in equal shares as tenants in common. 8. If the said Joan Nancy Pointer shall die under the age of 25 years and no children or child of hers shall attain a vested interest in my residuary estate under the trusts hereinbefore declared my trustees shall hold my residuary estate upon trust for my said daughter Ada Ellen Shonfeld absolutely if she shall be living at the date of the failure of the trusts hereinbefore declared concerning my residuary estate but if she shall not be then living then upon trust as to both capital and income for all or any the children or child of my said daughter living at the date of such failure as aforesaid who being male attain the age of 21 years or being female attain that age or previously marry and if more than one in equal shares as tenants in common.

The defendant Joan Nancy Pointer has attained the age of 21 years, but has not attained the age of 25 years. Of course, she is primarily the object of the testatrix's bounty under the terms of the will. Her mother, the third defendant, has an income which is stated in the evidence to be £159 per annum, but, in view of the facts which were stated by counsel at the hearing, I think that it is about £180 per annum. The defendant Joan Nancy Pointer is not in good health, and there is medical evidence as to that.

This being an application under the Inheritance (Family Provision) Act, 1938, first of all I have to consider whether the two plaintiffs are respectively dependants within the meaning of the Act. There is no doubt that the husband comes within the Act, because he is expressly mentioned in sect. 1 (1) (a). The daughter, by virtue of the provisions

of sect. 1 (1) (b), comes within the terms of the Act only if she has not been married, which is not the case here, or if she is :

... by reason of some mental or physical disability, incapable of maintaining herself.

A The daughter is 55 years of age. She suffers from disabilities of health which now prevent her from carrying on her previous profession as a pianist, and she is unable to do heavy household duties. At the moment, she is employed as a housekeeper by a friend of her family, and she gets board and lodging but no wages.

B I have no hesitation in finding that, in those circumstances, the daughter is, within the meaning of the Act, a person who, by reason of physical disability, is incapable of maintaining herself. It is true that she is getting board and lodging at the moment from this family friend for doing something within the household, but, of course, that is a precarious employment.

C Since both of these persons come within the terms of the Act, the question is whether or not this will makes reasonable provision for their maintenance. First of all, I shall consider the case of the daughter. I do not think that this will makes reasonable provision for her maintenance. The daughter and the testatrix were, apparently, on perfectly
D good terms. In fact, the testatrix lived in the same house with the daughter at the end of her life. I do not think that, in all the circumstances, the legacy of £1,000 is a reasonable provision for the maintenance of the daughter. Her counsel has suggested that, in all the circumstances, the reasonable provision would be the income of one-fifth of the
E net residuary estate or £2 per week, whichever is the smaller sum. I think that that is a not unreasonable suggestion, but, taking all the circumstances into account, I think that the maximum should be somewhat lower in the case of the daughter. I propose to order that the income of one-fifth of the net residuary estate or the sum of 30s. per week, which-
F ever is the smaller sum, shall be paid to her during her life, subject to the provisions of sect. 1 (2) (b) of the Act.

With regard to the widower, I have felt very considerable hesitation, but I feel that, in the circumstances of the case, as he has been deprived of the society of his wife since 1893, and they have remained on good
G terms, and having regard to his age, his physical infirmities and the scantiness of his means, it would be reasonable to make some small provision for him to assist him in his declining years. In his case, I propose to direct that the income of one-fifteenths of the residuary estate or a sum of 5s. per week, whichever is the smaller, be paid to him during
H his life or until his remarriage. With regard to the daughter, the position is this. I have to ask myself whether she is either married or under a disability. The answer is that she is both married and under a disability. The Act says that the order shall provide for termination of the payment of this income not later than her marriage or the cesser of her disability, whichever is the later. I think that the intention of sect. 1 (2) (b) must

be this. In the case of a daughter who has been married, it no doubt takes into account the fact that she is married, and makes the allowance accordingly, as I have done. The Act does not seem to provide for the case of her being left a widow and remarrying, and I think that that must be left to be covered by sect. 4. My present view is that, in the case of a daughter who has not been married, the payments must cease A on her marrying, and that that limb of the subsection has no application to the present case. In the case of a daughter who is under disability, they must cease on the cesser of her disability. The words "whichever is the later" seem to me extremely difficult to construe, but that is the interpretation which I feel disposed to put on the Act. The order B will, therefore, be for payment of the allowance for the life of the daughter, but with a proviso that it shall terminate on the cesser of her physical disability. If the balance, after payment of tax on one-fifth of the residuary estate, is more than 30s. per week, she is to be paid 30s. per week, but, if it is less than 30s. per week, she is to receive the net income. C There must be an undertaking to credit the trustees with any rebate on account of income tax. Under sect. 1 (1), the court may impose any condition which it thinks fit, and I shall impose a condition that the daughter shall inform the trustees if, as a beneficiary under a will or otherwise, she receives at any one time a sum in excess of £200 from any D source.

Order accordingly. Costs of all parties as between solicitor and client to come out of the estate.

Solicitors: *R. A. W. Jones* (for the plaintiffs); *Soames, Edwards & Jones* (for all the defendants). E

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

BURY v. EPPING RURAL DISTRICT COUNCIL AND ESSEX COUNTY COUNCIL.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Hawke and Humphreys, JJ.), **November 5, 1940.**]

A *Town and Country Planning—Compensation—When right to compensation accrues—Date when scheme comes into operation—Town and Country Planning Act, 1932 (c. 48), s. 18.*

B On July 8, 1927, the first respondents passed a resolution to prepare a scheme with respect to land in their district, and the resolution was duly approved by the Minister of Health. On Sept. 26, 1930, they resolved to provide in the scheme for the reservation of land for the construction of a road, the land reserved including certain land of which the appellant was the owner. The appellant considered his land to be ripe for building in 1930, and, on Feb. 21, 1935, he applied for, but was refused, permission to develop the land. On Jan. 31, 1939, he conveyed the land to the Minister of Transport for the sum of £1,425. On July 1, 1936, the second respondents succeeded to the powers and duties of the first respondents. They revoked the resolution of the first respondents, dated July 8, 1927, and passed a fresh resolution to prepare a scheme. On Mar. 4, 1938, they adopted a new draft scheme, and by resolution of Oct. 4, 1938, they made a scheme which, up to the time of these proceedings, had not been finally approved in accordance with the Town Planning Act, 1932, Sched. I, Part II. The appellant claimed a sum of £533 9s. 10d. as compensation under sect. 18 of the Act for injurious affection of his land by the restriction of its development from Oct., 1930, when it was reserved as a road, to Jan. 31, 1939. The claim was referred to an official arbitrator, who found (i) that the resolution to prepare a scheme restricted the user of the land and injuriously affected the estate and interest of the claimant, (ii) that the land was ripe for development during 1932, and (iii) that during 1932 the appellant could have obtained the sum of £1,425 for the land. It was contended that the appellant was entitled to compensation for injurious affection to his land between 1932 and 1939:—

E HELD (HAWKE, J., *dissenting*): a provision in a scheme cannot come into operation within the meaning of sect. 18 (1) of the Act until the scheme itself is finally approved and has come into operation. Since the scheme had not come into operation and the appellant had already parted with all his interest in the land, he could not be entitled to compensation.

F [EDITORIAL NOTE. The question here is purely one of the construction of the Town and Country Planning Act, 1932, s. 18. In a dissenting judgment, HAWKE, J., has expressed the view that the wording of that section is directed to defining the person who is to receive the compensation and not to the time when the right to compensation accrues. It has, however, been decided by a majority that no right to compensation for injurious affection accrues until the scheme actually comes into operation.

G AS TO RIGHT TO COMPENSATION, see HALSBURY, Hailsham Edn., Vol. 32, pp. 247, 248, para. 380; and FOR CASES, see DIGEST, Supp., Public Health, Nos. 503a-506d.]

H Cases referred to:

- (1) *A.-G. v. Horner* (1884), 14 Q.B.D. 245; 42 Digest 743, 1679; 54 L.J.Q.B. 227; *on appeal* (1885), 11 App. Cas. 66.
- (2) *Bond v. Nottingham Corporation*, [1940] 1 Ch. 434; [1939] 3 All E.R. 669; Digest Supp.; 108 L.J.Ch. 336; 161 L.T. 221; *previous proceedings*, [1939] 2 All E.R. 610.

APPEAL by way of case stated from a decision of an official arbitrator with reference to a claim for compensation for injurious affection to property in connection with a town-planning scheme under the Town and Country Planning Act, 1932. The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

R. M. Montgomery, K.C., and A. W. Bowyer (for *Thomas Dawson* on A war service) for the appellant.

Harold B. Williams for the respondents.

VISCOUNT CALDECOTE, L.C.J. : This is an appeal by way of a special case stated for the opinion of the High Court by the official arbitrator with reference to a claim for compensation for injurious affection to property in connection with a planning scheme under the Town and Country Planning Act, 1932. On July 8, 1927, the first respondents, the Epping Rural District Council, passed a resolution under the Town Planning Act, 1925, to prepare a scheme with respect to land within their district. The resolution was duly approved by the Minister of Health in accordance with sect. 6 of the Act. The resolution then, in the language of the section, "took effect." On Sept. 26, 1930, the Epping Rural District Council resolved to provide in the scheme for the reservation of land in their district for the construction of a road to be known as the North Orbital Road. Subsequently, the Town and Country Planning Act, 1932, was passed, repealing and re-enacting the Town Planning Act, 1925. On July 1, 1936, the Epping Rural District Council relinquished in favour of the second respondents, the Essex County Council, all their powers and duties, except those relating to interim development, relating to the preparation of a planning scheme under the Act of 1932. The resolution passed by the Epping Rural District Council in July, 1927, was revoked by the Essex County Council, which passed a resolution to prepare a scheme. On Mar. 4, 1938, the county council adopted a new draft scheme, and by resolution dated Oct. 4, 1938, made a scheme and directed that it should be submitted to the Minister of Health for approval. This was done on Feb. 20, 1939, but the scheme has not yet been finally approved by the Minister of Health or laid before Parliament in accordance with the provisions of Part II of the first schedule of the Act, to which I refer later.

The land reserved for the construction of the North Orbital Road included certain land of which the appellant was the owner, and this land forms the subject of the claim by the appellant which has resulted in the present proceedings. The appellant claimed a sum of £533 9s. 10d. from the respondents as compensation for the restriction of development of his land from Oct., 1930, to Jan. 31, 1939. The land was reserved for the purposes of the North Orbital Road in Oct., 1930, and Jan. 31, 1939, was the date of the conveyance of the land to the Minister of Transport under a contract of sale, made in the following circumstances. The appellant considered his land to be ripe for building in

1930, and, in accordance with the provisions of sect. 10 of the Act of 1932, on Feb. 21, 1935, he applied to the Epping Rural District Council for permission to develop the land. The Epping Rural District Council refused permission, and on Mar. 28, 1935, the appellant appealed to the Minister of Health under sect. 10 (5) of the Act. Ultimately, the appellant
A agreed to sell the land in question to the Minister of Transport for the sum of £1,425. Thereupon the Minister of Health formally dismissed the appeal, the appellant having parted with his interest in the land in respect of which he had sought an interim development order.

The appellant's claim was referred to the official arbitrator. He was
B satisfied (i) that the resolution to prepare a scheme restricted the user of the land and injuriously affected the estate and interest of the claimant, (ii) that the land was ripe for development during 1932, and (iii) that during that year the appellant could have obtained the sum of £1,425 for the land. The question for the arbitrator was whether
C in the circumstances, the appellant was entitled to anything for the injurious affection which his land suffered while he was the owner of it. When the case was argued before us, counsel for the appellant took the time found by the arbitrator as the time when the land was ripe for development to be the date when the injurious affection in respect of
D which his client was claiming began, and submitted that the appellant was entitled to compensation for the injurious affection of the land from that date—namely, 1932—to the date when he sold the land—namely, Jan. 31, 1939.

The appellant's rights depend upon the answers to certain questions
E which have been submitted to us by the official arbitrator. The first question is whether a provision in a scheme has come into operation within the meaning of sect. 18 of the Act by reason of the resolution to prepare a scheme or the marking of the North Orbital Road on the draft scheme map or otherwise. For the purpose of answering this question,
F it is necessary to look closely at the provisions of the Act. Sect. 18 is the first of a group of sections dealing with compensation and betterment. It provides as follows :

Subject to the provisions of this Act, any person (a) whose property is injuriously affected by the coming into operation of any provision contained in a scheme . . . shall, if he makes a claim within the time limited for the purpose by this Act, be
G entitled to recover [compensation].

Does the appellant's claim come within these words ? Before a scheme can come into operation, certain conditions required by the Act have to be satisfied. Under the provisions of Sched. I, Part I, para. 3, a scheme
H "shall be capable of coming into operation in accordance with the provisions of Part II of this schedule unless " either House of Parliament resolves that the scheme ought not to come into operation. Sched. I, Part II, then provides that the scheme "shall become operative" at the expiration of 6 weeks from the date of publication of a notice stating "that the scheme has been laid before both Houses of Parliament and is capable of coming into operation."

We were asked to say that the appellant's property was injuriously affected by the coming into operation of a provision contained in a scheme, the provision being the reservation of the land for the making of the North Orbital Road, and that this provision came into operation within the meaning of sect. 18 notwithstanding the fact that the scheme itself had not reached the final stage, and had not come into operation. A

In fact, the scheme has not yet been finally approved by the Minister of Health, and has not yet been laid before Parliament. If sect. 18 (1) (a) is read alone and for the first time, the interpretation put upon it by counsel for the appellant is attractive, but I have come to the conclusion that the contention of the respondents is the right one, and that B the words in question must be read as applying solely to a case where the scheme itself has come into operation. I have come to this conclusion as the result of an examination of the Act as a whole, and, more particularly, of sect. 18. Discussion took place as to the meaning and effect of sect. 18 (2). If sect. 18 (1) (a) is construed as I think it C should be, subsect. (2) presents no difficulties. The Act gives compensation to the owner of land which is injuriously affected by some provision contained in a scheme which has come into operation. If, meanwhile, in addition to the injury thus caused, the owner of the land has suffered any additional injurious affection because he has been D refused an interim development order, account must be taken of this in awarding the compensation payable in respect of injurious affection under the provisions of sect. 18 (1) (a). The appellant bases his claim, not upon subsect. (2), but upon the provisions of subsect. (1) (a). In order to succeed he must bring himself within the words of the sub- E section. The construction placed upon its language by counsel for the appellant seems to me to give no proper effect to the words "whose property" in the context in which they appear. I find difficulty, moreover, in seeing what effect could be given to the provisions of subsect. (2) if the interpretation of counsel for the appellant of subsect. (1) (a) is F accepted. It is unnecessary for me to set out in detail the various provisions in this elaborate and difficult Act, but a careful examination of its provisions confirms me in the opinion which I have formed. A scheme begins with a resolution. Sections 6 to 9, inclusive, provide for the procedure with respect to the preparation or the adoption of schemes. G If the owner of land desires, before the scheme comes into operation, to develop it, he may apply for what is called an "interim development" order. If such an order is obtained, the rights of the owner of the land will be protected. If an order is refused, then, when he subsequently becomes entitled to compensation under sect. 18 (1) (a), H he will be in a position to recover something for the additional injurious affection due to the refusal of an interim development order. The provisions of the Act as to the time within which claims can be made, and particularly the provisions of sect. 24 enabling the responsible authority to withdraw any of the provisions of the scheme which have

given rise to a claim for compensation, all seem to me to point in the same direction. For these reasons, I think that a provision in a scheme cannot come into operation within the meaning of subsect. (1) until the scheme itself is completed and has come into operation. I think, therefore, that the answer to the first question is in the negative.

- A This brings me to the second question, which is whether the appellant will be entitled in law to be compensated when the scheme is finally approved and its provisions come into operation, notwithstanding the fact that he will not then be the owner of the land. In my opinion, the answer to this question is also in the negative. The point of time
- B at which a right to compensation for injurious affection under sect. 18 arises is the coming into operation of the scheme. It seems to me to follow that only a claimant who is the owner of the property affected by the coming into operation of the scheme can claim the compensation given by sect. 18 (1) (a).
- C It was suggested in the course of argument that, if the conclusions which I have reached are right, the Act gives no compensation for a plain injury which the appellant suffered. I do not take this view. The appellant might have continued to own the land until the scheme came into operation, in which case he would become entitled to receive
- D compensation in accordance with the provisions of sect. 18. If, on the other hand, he chose to sell the land before the scheme came into operation, he might expect to obtain a price which took into account the compensation given in one form or another by the Act. However, our duty is to give effect to the provisions of the Act whatever the result may be.
- E I have not overlooked the submission of counsel for the appellant that we must approach the consideration of the Act in the way indicated in *A.-G. v. Horner* (1). The answers which I have given to the questions submitted to us, however, are answers which seem to me to be required by the plain provisions of the Act.

- F
- HAWKE, J. : I understand that I am in a minority in this matter, and that, these proceedings being final, my judgment about it is, therefore, quite unimportant, but I desire to explain shortly my views upon the two matters in the case which lead to my difference of opinion. The
- G respondents contend that, inasmuch as the claimant sold the property affected before making his claim for injurious affection and before the scheme became final, he can never recover anything in respect of any affection occurring during his ownership. Whether or not this is so is principally a matter of construction of sect. 18 of the Act. I under-
- H stand that it is common ground that in the sale he did not transfer such right, if any, as he had for compensation for injurious affection. That there was injurious affection is found as a fact. Are the respondents, then, to escape all liability for that injurious affection merely because, at the moment of his claim, the claimant can no longer say : " I am still owner of this property " ?

Though the point is, without doubt, one of difficulty, I think that this is not the true position. Having regard to the nature of the Act of Parliament, interfering as it does with proprietary rights, I think that its provisions should be construed upon the principle laid down in the case to which VISCOUNT CALDECOTE, L.C.J., has referred, followed also by the Court of Appeal in *Bond v. Nottingham Corporation* (2), and it is partly on that principle of construction that I base my opinion. The chief point raised by the respondent against this view is that, since sect. 18 is expressed in the present tense, compensation is thereby given only to the person who is the owner of the property at the time when the scheme comes into operation as a perfected and complete scheme, and this scheme has never been so perfected : see Sched. I, Parts I and II. I think, however, that the true construction of the section is that, by the use of the present tense, the Act is referring, not to the completion of the whole matter, but to the time when the injurious affection takes place, and that the owner at that time is the person to be compensated, unless, indeed, he has transferred his right to some other person meanwhile.

Obviously, and apparently admittedly, the inception of the scheme may interfere substantially with proprietary rights of development. To adopt the construction contended for by the respondents would be to interfere still further with the owner's rights. Does the statute mean that persons who are injuriously affected are not only subject to this general interference with their rights but are also sentenced, lest they should lose their right to be compensated, to remain owners during the delays, perhaps interminable, to which such schemes are apparently subject ? I think that the applicant does not lose his right.

The second point is whether, in speaking of the "coming into operation" of any provision contained in a scheme, sect. 18 means the "coming into operation" of a "completed scheme." I think that, if the statute intended this, it should have said so, and it does not appear to me to do so, certainly not expressly. The word "scheme" can have many meanings. Its ordinary dictionary meaning is "plan," which is often used to express intentions as to a course of action. The section does not refer to the "coming into operation" of a scheme as an expression which is explained by the Act of Parliament, as I have already pointed out. It expressly refers to the "coming into operation" of a provision contained in the scheme, which may mean a part of a proposal or plan. I think that this shows that it is not the "coming into operation" of the whole scheme which is essential, but it is the operation of one of the provisions of the proposal. I therefore conclude that the "coming into operation" of the provision means when the provision in question takes effect on proprietary rights. I cannot but think that injurious affection by reason of such provision constitutes a taking effect of the provision.

HUMPHREYS, J. : I agree entirely with the judgment which has been delivered by VISCOUNT CALDECOTE, L.C.J., but, as the court is not unanimous, I think it desirable to state quite shortly the reasons which have caused me to arrive at that conclusion, and I am content to base my judgment solely on the language of sect. 18 of the Act. It is not
A disputed that up to Jan., 1939, the claimant was the owner of property which was at some date injuriously affected by a provision contained in a draft scheme prepared by the local authority, the Epping Rural District Council. The particular provision affecting the property of the claimant was one relating to the construction of a road to be called the North
B Orbital Road, and was inserted in the scheme in 1930. Nor is it disputed that, if the claimant still owned the land at the time when that provision of the scheme came into operation, he would be entitled to recover as compensation from the responsible authority the amount by which his property was decreased in value. So much is clear from the language of
C sect. 18. The scheme has not yet come into operation, and the claimant sold the property in question in Jan., 1939. On Apr. 3, 1939, he claimed from the respondents £533 9s. 10d. as compensation for injurious affection to his property from 1930 to the date of sale by him.

This case stated by the arbitrator raises two points, and the court is
D invited to answer two main questions. The first question is as follows :

Whether a provision in a scheme has come into operation within the meaning of sect. 18 of the Act of 1932 by reason of the resolution to prepare a scheme or the marking of the North Orbital Road on the draft scheme map or otherwise.

The effect of the answer to that question is to decide whether the
E claimant rightly brought his claim at the time when he did so bring it as being a person who was then entitled to compensation under sect. 18. In my judgment, this question must be answered in the negative.

Since it is clear that the scheme itself has never come into operation, the claimant can succeed only if he can establish that the provision
F affecting his property came into operation at some date prior to his claim, and thus in advance of the coming into operation of the scheme as a whole. I can find nothing, either in the facts as stated in the case or in the language of the section, which supports that contention. The language of sect. 18 appears to me to be plain and free from ambiguity.
G No reference is made in the section to the scheme coming into operation, for the simple reason that the scheme itself can give no right to compensation. In any case, where the right to compensation exists, it must be because some particular provision or provisions injuriously affects or affect the property of the person who thereby becomes entitled
H to make a claim. When do the provisions of the scheme come into operation? The only possible answer to that question is, I think, that the provisions which together make up the scheme do not come into operation until the draft scheme has ceased to be merely a series of proposals and has become an operative instrument binding upon all bodies and persons mentioned therein. In other words, the various

provisions come into operation when the scheme comes into operation. If the scheme in question ever comes into operation, it will do so at the expiration of 6 weeks after the serving of certain notices, as provided in Sched. I, Part II, para. 4. It is common ground that that date has not yet arrived. Until that date, in my view, no provision can be said to be in operation unless there is something in the scheme itself to indicate a contrary intention. A

The second question which is asked is as follows :

If the answer to question 1 be in the negative, whether the claimant will be entitled in law to be compensated when the scheme is finally approved and its provisions come into operation, notwithstanding that he will not then be the owner of the said land. B

I answer this question also in the negative. The answer, I think, really depends upon the answer to the first question. The material date, as assumed in this question, and as provided in sect. 18, is the date when the provisions of the scheme come into operation. C

If HAWKE, J., is right in the view which he takes as to the date when this provision came into operation, then, no doubt, the claimant always has been entitled to make a claim at any time he chose, but, if I am right in my view as to that date, it is clear that the claimant will not then be a person whose property is injuriously affected by the coming into operation of the provisions of the scheme, since he has already ceased to be the owner of any property affected either by the scheme or by any of its provisions. For these reasons, I agree with the judgment of my Lord. D

Solicitors : *Montagu's & Cox & Cardale* (for the appellant) ; *Sharpe, Pritchard & Co.*, agents for *E. S. Holcroft*, Chelmsford, Clerk to the Essex County Council (for the respondents). E

[Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.]

DALTON MAIN COLLIERIES, LTD. v. ROSSINGTON MAIN COLLIERY CO., LTD., AND AMALGAMATED DENABY COLLIERIES, LTD. F

[CHANCERY DIVISION (Farwell, J.), **November 6, 7, 1940.**] G

Mines—Coal mine—Lease—Assignment—" Mine-owner "—Rents and royalties—Outgoings—Execution of statutory drainage works—Deduction of cost from rents and royalties—Doncaster Area Drainage Act, 1929 (c. xvii), ss. 12 (1), (3), 33.

By an underlease dated July 31, 1911, the plaintiffs demised to the first defendants certain beds of coal with a right to work and get the coal. The first defendants covenanted in the underlease to pay the rents and royalties therein prescribed clear of all deductions except landlord's property tax and mineral rights duty and to pay all existing and future taxes, rates, assessments and outgoings of every description. The underlease became vested by way of assignment in the second defendants under a scheme, confirmed in 1936, whereby the second defendants were constituted, and they subsequently had to execute H

certain drainage works under the Doncaster Area Drainage Act, 1929. Section 12 (1) of that Act provides that a mine-owner—it was agreed that the second defendants were mine-owners—who incurs costs in constructing or maintaining necessary drainage works, or who has to pay money in respect of those costs, can deduct from royalties payable by the mine-owner the proportion of the costs or money determined to be proper. Under subsect. (3) the sum reserved by and payable under the lease is deemed to be the net amount after the deduction. The plaintiffs commenced proceedings against both defendants to recover the full amount of the royalties. The second defendants claimed the right to make the deduction provided by sect. 12 (1). The plaintiffs contended that they were entitled to the full amount reserved by the underlease, and that, if the second defendants were not liable to pay the full rent, the first defendants remained so liable on the covenants of the underlease from which they had not been released:—

HELD: since the underlease had been assigned, the amount of the rent and royalties payable by the first defendants was the same as that payable by the second defendants, which, by the terms of sect. 12 (3) of the Act, was the net amount after the deduction provided for by sect. 12 (1). The costs in respect of the drainage works were not a tax, rate, assessment or outgoing within the meaning of the covenant in the underlease. Therefore, on the true construction of the Act and the underlease, the royalties as defined in the Act reserved by and payable under the underlease were, as between both defendants and the plaintiffs, to be deemed to be the net amount after making such deduction therefrom as the second defendants might be entitled to make under sect. 12 (1).

EDITORIAL NOTE. Subsidence due to mining operations must often lead to interference with the drainage of the surface lands and necessitate the execution of works, and consequent expenditure of money, to ensure the proper drainage of the lands. Under the private Act here in question, these costs were placed upon the mine-owner with a right of deduction against rent and royalties. It is here held that such a sum was not an outgoing, even where the covenant in that respect was in very wide terms. It was decided by the Court of Appeal in a previous case that, where a sublessee was the mine-owner, the lessee was not necessarily entitled to make the deduction against the head lessor. Here, however, there was, as between the defendants, no sublease, but an assignment of the lease, and, therefore, the amount of the rent payable by the lessees and the assignees was the same. Since the assignees were entitled under the Act to make the deduction, it here necessarily followed that lessees were entitled to make the same deduction.

AS TO OUTGOINGS, see HALSBURY, *Hailsham Edn.*, Vol. 20, pp. 191-195, paras. 211, 212; and FOR CASES, see DIGEST, Vol. 31, pp. 301-310, Nos. 4458-4534.]

Case referred to:

- (1) *Denaby & Cadeby Collieries, Ltd. v. Brodsworth Main Colliery Co., Ltd.* (1935), Oct. 24, Unreported.

ACTION for declarations relating to the liability for rents and royalties reserved by a mining lease. The material facts having been agreed between the parties, a special case was stated for the opinion of the court on the contentions raised. The special case is fully set out in the judgment.

N. L. C. Macaskie, K.C., and *F. W. Beney* for the plaintiffs.

Charles E. Harman, K.C., and *Lindsay M. Jopling* (for *C. Montgomery White* on war service) for the defendants.

FARWELL, J. : This matter comes before the court in the form of a special case. The proceedings were commenced by a writ, dated Aug. 15, 1939, whereby the plaintiffs, Dalton Main Collieries, Ltd., claimed against the two defendants, Rossington Main Colliery Co., Ltd., and Amalgamated Denaby Collieries, Ltd., various declarations in the following terms :

(a) A declaration that the defendants and each of them are liable to pay to the plaintiffs the full amount of the rent and royalties due to the plaintiffs in accordance with the terms of an indenture of underlease dated July 31, 1911, and made between the plaintiffs and the first defendants and in accordance with the terms of a scheme of partial amalgamation made under the Mining Industry Act, 1926, by the Railway and Canal Commission and dated Apr. 27, 1936. (b) A declaration that the first defendants are not "mine-owners" within the meaning of the Doncaster Area Drainage Act, 1929. (c) A declaration that as between the plaintiffs and the first defendants the sum reserved by and payable under the said indenture of underlease is the full amount therein provided and not any reduced amount and that the provisions of sect. 12 (3) of the said Act have no effect as between the plaintiffs and the first defendants. (d) A declaration that under cll. 9, 11 and 12 of the said indenture of underlease and by the terms of para. 9 of the said scheme of partial amalgamation, the defendants and each of them are liable to pay to the plaintiffs the rent and royalties due under the said indenture of underlease clear of all deductions except landlord's property tax and mineral rights duty, and also to perform and observe all the covenants and stipulations which were and are imposed upon the plaintiffs (including the covenant by the plaintiffs to pay the rents) under the terms of the several leases specified in the first schedule to the said indenture of underlease, and also to indemnify and keep indemnified the plaintiffs against all actions claims demands and liabilities under the said specified leases arising from the exercise by the defendants or either of them of the rights powers and liberties granted under the said indenture of underlease.

That writ having been issued, the parties wisely agreed the facts which were raised in the action, and the facts have been set out in the form of a special case, which contains at the end the questions which are submitted to the court for decision. The special case is, of course, an agreed document, and it will be convenient if I refer to it at once, although I may have to refer to certain of the documents mentioned in the special case later. The special case is in this form :

1. By several leases (hereinafter called the specified leases), particulars of which (containing the date the parties and term granted) are set out in the first schedule to the underlease hereinafter mentioned and therein numbered consecutively I to VIII, certain beds or seams of coal were demised to the plaintiffs for the several terms of years mentioned in the said first schedule, at the respective rents and royalties and subject to the respective covenants and conditions in the specified leases contained. 2. By an underlease (hereinafter called the underlease) dated July 31, 1911, and made between the plaintiffs of the one part and the first defendants of the other part the plaintiffs demised unto the first defendants certain beds or seams of coal demised by the specified leases, together with liberty to work and get the same and other rights and liberties, for the respective residues then unexpired of the several terms of years for which the properties were held under the specified leases (less the last 7 days of such respective terms of years), subject to the rents and royalties and the covenants on the part of the first defendants by and in the underlease reserved and contained. 3. The properties comprised in the underlease consisted of all the property demised by each of the specified leases numbered I, II, IV, V, VI, VII and VIII in the said first schedule thereto and part of the property demised by the specified lease numbered III in such first schedule. The rents and royalties reserved by the underlease included in respect of the properties comprised in the said 5 specified leases numbered I, II, IV, V and VI minimum rents of the same respective amounts and royalties at the same respective rates as those reserved by such 5 specified leases respectively. In the case of the part included in the underlease of the property comprised in the said specified lease numbered III, which reserved a minimum rent calculated according

to the area of such property, a proportionate minimum rent was reserved by the underlease in respect of the area of the part of such property included therein; and a footage royalty was reserved by the underlease at the rate payable under such specified lease. As regards the underlease of the properties respectively comprised in the said two specified leases numbered VII and VIII, footage royalties were reserved by the underlease at the rates reserved by such specified leases respectively, but no minimum rent was reserved by the underlease in respect of either of the last-mentioned properties. In addition to the rents and royalties referred to in this paragraph the underlease contained (in cl. 7 thereof) provisions for the payment by the first defendants to the plaintiffs of the additional royalty therein mentioned. 4. By the underlease the first defendants for themselves and their assigns covenanted with the plaintiffs that the first defendants (cl. 9) would pay the rents and royalties reserved by the underlease clear of all deductions (except landlord's property tax and mineral rights duty); (cl. 10) would pay all existing and future taxes rates assessments and outgoings of every description for the time being payable by the occupier in respect of the premises thereby demised or any lands buildings or works built constructed occupied or used in exercise of any of the liberties thereby granted or in respect of the rents thereby reserved or any of them (except landlord's property tax and mineral rights duty); (cl. 11) would during the term thereby granted perform and observe all the covenants and stipulations by the lessees and conditions respectively contained in the specified leases so far as such covenants stipulations or conditions respectively related to or concerned the coal and hereditaments thereby demised and ought to be performed and observed by the first defendants except that the first defendants should not be liable to pay directly to the superior lessors any of the rents or sums of money reserved by or payable under the specified leases; and in case the first defendants should (with the concurrence of the plaintiffs which they might revoke at any time if they thought fit) pay to the superior lessors or any of them any of the rents or sums of money reserved by or payable under the specified leases the first defendants should immediately thereafter produce to the plaintiffs or their agents the receipts or vouchers for such rents or sums of money so paid; and (cl. 12) would keep the plaintiffs indemnified against all actions claims demands and liability in respect of the exercise of the rights powers and liberties thereby granted save and except that the plaintiffs should be liable to pay to their superior lessors the rents royalties and sums of money reserved by and payable under the specified leases unless with the said concurrence of the plaintiffs they were paid to the superior lessors direct. The underlease also contained (cl. 19) a covenant by the plaintiffs with the first defendants (in addition to the usual covenant for quiet enjoyment) that the plaintiffs would duly pay and discharge all rents royalties and sums of money reserved by or payable under and would perform and observe all the covenants and stipulations performable and observable by the plaintiffs under the specified leases (other than such as the first defendants thereby covenanted to perform and observe) and would keep the first defendants indemnified against all claims demands and liability in respect thereof. 5. The second defendants were incorporated in pursuance of a scheme (hereinafter called the scheme) for the partial amalgamation of the constituent companies therein mentioned (including the first defendants) under the Mining Industry Act, 1926, Part I, and the Coal Mines Act, 1930, Part II, which was duly confirmed by the Court of the Railway and Canal Commission on Apr. 27, 1936. By cl. 4 of the scheme it was provided that upon the appointed day (now past) there should vest in the second defendants (therein referred to as the new company) the properties therein mentioned including *inter alia* all the leases and licences to get minerals set out in the schedule to the scheme (one of which was the underlease), and that the new company should take the property which would vest in it under that clause subject as therein mentioned and in particular "in the case of leases or licences to get coal then subject to the terms of such lease or licence as modified or extended by any subsequent agreement." Clause 9 of the scheme (so far as material for the purposes of this case) is in the following terms: "The new company shall keep and perform the covenants contained in the several leases under which the leasehold properties vested in them by this scheme are held. The new company shall be under the same liability to the lessors of the said leases as they would have been had the same been assigned to it by deed and shall enjoy the benefit of all the terms and covenants contained in the said leases or in any agreement or agreements modifying or extending the same in the same way as the respective constituent company was entitled to do and shall have the same right to recoup short workings. The constituent companies shall not be relieved of their primary liability to the lessors as the lessees under the said leases but the new company shall indemnify the constituent companies against all claims and liabilities arising out of the said leases whether for rent or otherwise in so far as they relate to properties which under this scheme

vest in the new company." 6. There has been a surrender of the coal demised by the specified lease number IV and since the confirmation of the scheme certain transactions affecting specified lease number II or the portions of the demised premises comprised therein, resulting in certain modifications of the rents and royalties payable under the underlease, have taken place; but the details of these transactions are not material for the purposes of this case. 7. By virtue of the underlease and the vesting thereof in the second defendants effected by the scheme the second defendants are "mine-owners" within the meaning of the Doncaster Area Drainage Act, 1929 (hereinafter referred to as the Act). By sect. 33 of the Act "mine-owner" is defined as meaning "the owner lessee or other persons entitled to work and get minerals." In accordance with the obligations imposed on the second defendants by sect. 9 of the Act they have as mine-owners working or proposing to work minerals carried out certain works of the nature specified in the said sect. 9 in connection with portions of the premises comprised in and demised by the underlease. In these circumstances and subject to the operation of cl. 9-12 of the underlease (if any) the second defendants have become entitled under sect. 12 of the Act to deduct from the "royalties" (as defined by the Act) payable under the underlease and pursuant to cl. 9 of the scheme to the plaintiffs (who are for this purpose "royalty owners" within the meaning of the Act) a proper proportion (determined in accordance with the provisions of the said sect. 12) of the cost of the said works. The first defendants have ceased to be "mine-owners" and to work or propose to work minerals. By the said sect. 12 (3) it is provided as follows: "In any case in which the mine-owner is entitled under the provisions of this section to make a deduction from royalties the sum reserved by and payable under the lease shall be deemed to be the net amount arrived at after making such deduction." By sect. 33 of the Act the expression "royalty" is defined as including "every sum payable by a mine-owner (whether by way of rent or other reservation and whether by the acre or the ton or otherwise) in respect of the right to work and get minerals." The proportion of the said costs which the second defendants are entitled to deduct as aforesaid has not yet been determined.

Then the three questions are submitted for the opinion of the court:

(1) Whether upon the true construction of the Act and in the events hereinbefore stated the royalties (as defined in the Act) reserved by and payable under the underlease are as between the first defendants and the plaintiffs to be deemed to be the net amount arrived at after making such deduction therefrom as the second defendants may be entitled to make under sect. 12 of the Act and the liability of the first defendants to the plaintiffs under the underlease in respect of royalties (as so defined) is to be treated as reduced accordingly by the amount of such deduction as aforesaid. (2) Whether upon the true construction of the underlease and in the events aforesaid the defendants or either of the defendants are bound notwithstanding the provisions of the Act to pay to the plaintiffs or on their behalf, by way of indemnity or otherwise the full amount (without any such deduction as aforesaid) of the rents and royalties expressed in the underlease to be payable by the first defendants to the plaintiffs (as varied by the transactions mentioned in para. 6 hereof) or the amount of the said rents and royalties less some only and if so what part or proportion of such deduction. (3) Whether or not in the events aforesaid and upon the true construction of the Act the scheme and the underlease the first defendants are entitled to deduct from the royalties which the plaintiffs are entitled to receive such proportion of the costs incurred or sums paid under the Act by the second defendants as may be determined to be proper in accordance with the provisions thereof.

That being the special case, and the facts as stated there being agreed, it becomes necessary to determine the questions which are raised, and it will be convenient to sum up very shortly what the position is as it emerges from the facts stated in the special case. The plaintiffs are the lessors of the mines and minerals in question in this case. They themselves are lessees from a head landlord. That is not very material, but it should be borne in mind that they themselves are in the position of lessees, but, as between themselves and the defendants, they are the lessors. On July 31, 1911, the plaintiffs granted to the first defendants an underlease—that is, a lease of the mines and minerals in question upon

the terms of that underlease—and I may have to refer again to the exact language of some of it. In 1929, the Doncaster Area Drainage Act, 1929, came into force, and that Act and its provisions I shall have to consider again in a moment. On Apr. 27, 1936, the scheme under which the second defendant company was constituted was confirmed by
 A the Court of the Railway and Canal Commission, and since that time the second defendants have been called upon to do certain things which were required for drainage purposes under the Doncaster Area Drainage Act, 1929. The exact amount which they are entitled to deduct from the rent under the Act has not yet been determined, and will ultimately
 B have to be determined by arbitration, as provided by the Act itself.

As I understand the form of the special case, it is not any longer disputed that the second defendants are the mine-owners within the meaning of the Doncaster Area Drainage Act, 1929, nor do I think that, in the face of the decision of the Court of Appeal in the case to which
 C I have been referred, it could seriously be contended—at any rate, before me—that the second defendants are not the mine-owners in question, and, under the provisions of that Act, they are entitled to deduct from the rent which would otherwise be payable to the plaintiffs (who, I think are quite clearly the royalty-owners, and, as such, entitled to the rent)
 D whatever the proper sum may be, when it has been ascertained. However, that does not get over the difficulty, because it is said that the first defendants are not relieved in any sense from their liability to the plaintiffs to pay the full rent, and that, whatever deduction the second defendants may be entitled to make under the Act, that cannot relieve
 E the first defendants from the contractual liability which is contained in the lease granted by the plaintiffs to the first defendants. It must be borne in mind in this case that this is not a case of a sublease granted by the first defendants to the second defendants. It is not a case where one has a superior landlord and a tenant under that superior landlord,
 F and then a sublease by the lessee to another person. That is not the position. The position here is that the plaintiffs are the lessors. The first defendants were the lessees, and, by virtue of the scheme, the second defendants are the assignees of the first defendants, so that there is not any question of separate leases, a lease and an underlease, or anything
 G of that sort. It is, as between the parties to the action, a case of a lease and an assignment of that lease to the second defendants.

I think that it is desirable to see exactly what is the effect of the Doncaster Area Drainage Act, 1929. I do not propose to refer to it in very great detail, but the purpose of the Act, as stated in the preamble,
 H is to make provision for the better drainage of a certain area which is the area in which these particular mines are situate, and the Doncaster District Drainage Board are constituted. The Doncaster District Drainage Board are given certain powers, and they have exclusive powers and jurisdiction in respect of certain rivers. I do not think that I need refer to that. Then sect. 4 gives the Central Board general supervision

with regard to the drainage of the Doncaster district. I think that I can now pass on to sects. 9, 10 and 12 of the Act. Sect. 9 imposes upon the mine-owners the obligation to execute certain works necessitated by subsidence, and it provides as follows :

... it shall be the duty of every mine-owner working or proposing to work minerals under any lands situate within the Doncaster district, or so near thereto that the surface of any lands in the said district will or may be affected by the working of the minerals, to construct and maintain in proper condition such works and do such things as may, by reason of any subsidence which results or may result from the working of the minerals, be requisite in order to obviate or remedy, so far as having regard to all the circumstances of the case is reasonably necessary, any loss of efficiency which has arisen or may arise in the drainage system and drainage works of the Doncaster district. (2) It shall be the duty of every such mine-owner to comply with such reasonable directions as may from time to time be given to him by the Central Board with respect to the construction or maintenance of any drainage works which he is required under this part of this Act to construct or maintain, or with respect to the making of the necessary financial provision for securing the due construction of any such works, and the Central Board may at any time by notice require any such mine-owner to prepare and to submit to the board within such reasonable time as may be specified in the notice a scheme with respect to any works of construction or maintenance required to be executed by him . . .

Then there is a provision for the mine-owner making default, and a provision with regard to producing plans and matters of that kind. Then in sect. 10 there is a provision for the establishment of funds by mine-owners for the maintenance of works :

(1) Every mine-owner who, under the provisions of the last-foregoing section, is liable to construct any drainage works shall (a) establish and maintain such a fund as will in the opinion of the Central Board be sufficient to produce in perpetuity an income of such an amount as will be required to provide such sums as may from time to time be necessary for the maintenance, so far as is reasonably necessary, of the said works after the mine has permanently ceased to be worked ; (b) keep and, on demand, produce to the Central Board proper accounts showing the cost of maintaining the said works ; (c) on demand, produce to the Central Board such particulars as they may require with respect to the investments or securities constituting the fund and the persons in whom the fund is vested, and otherwise with respect to the sufficiency of the fund. (2) Every fund established in pursuance of the requirements of this section shall, subject to the provisions of this section, be deemed to be held in trust for the Central Board. (3) Until the mine permanently ceases to be worked the mine-owner may, from time to time, with the consent of the Central Board, change the investments or securities constituting the fund, and any income arising therefrom shall belong to the mine-owner for his own use. (4) On the mine permanently ceasing to be worked, the persons in whom the fund is then vested shall, in accordance with such directions as may be given by the Central Board, transfer the fund to the board, and the works constructed as aforesaid by the mine-owner, including any plant belonging thereto, shall by virtue of this Act vest in and become the property of the board, and thereupon the obligation of the mine-owner to maintain the said works shall cease.

I do not think that I need refer to the next two sections. Sect. 12, which is the section which is of real importance in this case, provides as follows :

(1) Where in compliance with the provisions of this part of this Act any costs are incurred by a mine-owner in constructing or maintaining any drainage works required by reason of subsidence or apprehended subsidence due to the working of minerals (including any sums paid by him towards any maintenance fund established by him), or where in pursuance of the said provisions a mine-owner is required to pay to the Central Board any sum in respect of costs incurred by the Board in the execution of any such works, the mine-owner shall be entitled to deduct from the royalties which any person is entitled to receive in respect of the minerals, such proportion of the costs so incurred or of the sum paid as may be determined

to be proper. (2) In ascertaining what is the proper proportion to be deducted under the foregoing subsection from any royalties, regard shall be had (amongst any other relevant considerations) to the terms of any contract between the mine-owner and the royalty-owner, and to the benefit, if any, accruing to the royalty-owner by reason of the expenditure incurred by the mine-owner in pursuance of his duties and liabilities under this part of this Act. (3) In any case in which the mine-owner is entitled under the provisions of this section to make a deduction from royalties the sum reserved by and payable under the lease shall be deemed to be the net amount arrived at after making such deduction. . . . (5) In default of agreement between a mine-owner and a royalty-owner as to the proper proportion to be deducted from any royalties under this section, or in default of agreement between a surface-owner and a mine-owner or the Central Board, as the case may be, as to any sum to be paid by the surface-owner under this section, the question shall be referred to an arbitrator to be appointed by the Minister and the decision of the arbitrator shall be final.

I do not think there is anything else in the Act to which I need refer, except sect. 33, the definition section. In that section, "mine-owner," "royalty," and "royalty-owner" are defined thus:

"Mine-owner" means the owner, lessee, or other persons entitled to work and get minerals; "royalty" includes every sum payable by a mine-owner (whether by way of rent or other reservation and whether by the acre or the ton or otherwise) in respect of the right to work and get minerals, and "royalty-owner" means a person entitled to receive a royalty.

It is quite clear, in my judgment, as I have already said, that, under this Act and as a result of a decision of the Court of Appeal to which I shall refer, the second defendants, Amalgamated Denaby Collieries, Ltd., are the mine-owners within the meaning of the Act, and are the only company entitled at the present time to work the mines in question, and, therefore, come exactly within the definition of "mine-owners" in the Act. It is equally clear that the first defendants are not the mine-owners. They are the assignors of the lease. That company has no right now to work and get the mines, nor does it claim to have any such right. In those circumstances, it is quite plain, in my view, that the second defendants are the mine-owners in question. Indeed, that is not disputed in the special case, and is in accordance with the decision of the Court of Appeal in *Denaby & Cadeby Collieries, Ltd. v. Brodsworth Main Colliery Co., Ltd.* (1). That being so, having regard to sect. 12 of the Act, the second defendants are entitled to make a deduction from the amount of the royalties. In other words, the rent which they are liable to pay, and the amount of such deduction, if not agreed, is a matter to be determined by arbitration, as is provided by the Act.

The rent under the lease—again I must stress the fact that there is only one lease in this case—is payable to the plaintiffs, and the plaintiffs are, therefore, the royalty-owners within the meaning of the Act, and it would seem to be reasonably clear that, as between the second defendants and the plaintiffs, the second defendants are entitled to the benefit given by sect. 12 of the Act as against the plaintiffs. The second defendants are the persons who have been called upon to do, and have done, certain works which have cost them money, and they are entitled to make a deduction from the rent payable accordingly. However, it

is said that, if that be so, and assuming that the second defendants are in a position to make a deduction, that does not necessarily relieve the first defendants from their liability as assignors to pay to the plaintiffs the full amount of the rent. It is to be noted that, when one looks at sect. 12, subsect. (1) would seem to make it reasonably clear that a deduction from rent or from royalties was in terms provided for as between the mine-owner and the royalty-owner, and, if the only persons who are to be affected by that are the royalty-owners and the mine-owner, subsect. (3) would seem to be somewhat redundant. A

At any rate, whatever the effect of subsect. (3) may be, it makes it perfectly plain that the sum reserved by, and payable under, the lease shall be deemed to be the net amount arrived at after making such deduction. No doubt that means that, as between the mine-owner, who is liable to pay, and the royalty-owner, who is entitled to receive, the rent, the rent must be treated for all purposes as being the amount reserved by the lease, but subject to the deduction under the Act. If that be so, then it is said that that cannot have any effect upon the first defendants, who must remain liable under the lease as between themselves and the plaintiffs to pay the full rent. I think it was sought to obtain some support for that proposition from *Denaby & Cadeby Collieries, Ltd. v. Brodsworth Main Colliery Co., Ltd.* (1), but that decision, although of the greatest importance to me in determining who is the mine-owner within the meaning of this Act, does not, in my judgment, really assist me in arriving at a conclusion on the question in this case, because it must be borne in mind that in that case there was a lease and a sublease, and what was said in that case was that, although the sublessee, as the mine-owner, was entitled to a deduction of the rent as against his lessor (the sublessor), the sublessor had no right to make any corresponding reduction in the rent which he had to pay to his landlord. However, in that case, of course, the rent which was payable under the sublease, although the actual figure may have been the same, was not in fact the rent which the sublessor had to pay to his lessor. It was a sum of money reserved in each case by a separate document, and by a separate lease, and, although it was decided that the mine-owner could deduct as against his royalty-owner, it was held that the royalty-owner had no right as against his lessor to make any similar deduction. If the facts were the same in this case as they were in that, I should, of course, follow that decision, but, in my judgment, the facts are quite different, and that part of the case which deals with the rights as between the lessor and his lessee is not relevant, as it seems to me, to the considerations which arise in this particular case. Here the position of the parties is this. The first defendants are liable by the terms of the underlease to pay the rent thereby reserved to the plaintiffs. Perhaps it is desirable to look at the terms of the underlease, which provides as follows : B C D E F G H

The Rossington company [the first defendants] for themselves and their assigns

hereby covenant with the Dalton company that the Rossington company . . .
 9. Will pay the rents and royalties hereby reserved on the days and in the manner
 hereinbefore appointed for payment thereof respectively clear of all deductions
 (except landlord's property tax and mineral rights duty).

- As far as the rent is concerned, by virtue of the assignment which is contained in the scheme approved by the Court of the Railway and Canal Commission, the rents and royalties reserved under this lease and payable by the Rossington company to the plaintiffs, are now payable by the second defendants to the plaintiffs. The first defendants are not relieved of their liability to pay, but, if the rent under this underlease is paid and is received by the plaintiffs, then the liability of both the defendant companies, so far as rent is concerned, is satisfied. It is the same rent which has to be paid by one or other of the two defendants to the plaintiffs, and the plaintiffs are entitled to their rent, but, in my judgment, it is impossible to say that the rent which is affected by the provisions of the Doncaster Area Drainage Act, 1929, s. 12, is not the same rent as that which is payable by the second defendants to the plaintiffs, and the second defendants, having a right to the deduction provided by the Act, are entitled to that benefit as against the plaintiffs, and, having paid that rent, they have discharged, both on behalf of themselves and on behalf of the first defendants, the liability to pay the rents reserved by this lease. In my judgment, it is impossible to escape from the effect of the provisions of sect. 12 of the Act, especially subsect. (3). There is one rent which is payable under this underlease. That rent is deemed to be the net amount arrived at after making the deduction, and, as far as the defendants are concerned, there has been no default at all, because the plaintiffs will receive the rent reserved by this lease, but it will be less than the full amount, not by reason of any default on the part of either of the defendants, but by reason of the effect of the Act, which provides that, after the happening of the events provided for in the Act, the rent shall be a reduced amount. In my judgment, as far as the question of liability for the rent is concerned, as long as the plaintiffs get the full amount of the rent, less any proper deduction made under the Doncaster Area Drainage Act, 1929, s. 12, they have no cause to complain against either of the defendants, or to say that either of the defendants made default in the performance of their obligation to pay the rents in question.

- Then it is said that, even if the first defendants are not liable because they have not paid the full rent, they are liable under cl. 10 of the underlease, because they covenanted to pay all existing and future taxes, rates, assessments and outgoings of every description. In my judgment, it cannot be suggested that this deduction which the Act permits comes within any of those words. It is not a tax, it is not a rate, and it is not an outgoing, which, in my judgment, can possibly come within cl. 10. The second defendants have had to do certain work and provide certain moneys, and they have found those moneys in question, but to suggest that the deduction which the Act permits comes within any

of those words seems to me to be a contention which cannot be supported.

Then cl. 11, which is relied upon, provides as follows :

... will, during the term hereby granted, perform and observe all the covenants and stipulations by the lessees, and conditions, respectively contained in the specified leases so far as such covenants, stipulations, or conditions respectively relate to or concern the coal and hereditaments hereby demised, and ought to be performed and observed by the Rossington company, excepting that the Rossington company shall not be liable to pay directly to the superior lessors any of the rents or sums of money reserved by or payable under the specified leases ; and, in case the Rossington company shall (with the concurrence of the Dalton company which they may revoke at any time if they think fit) pay to the superior lessors, or any of them, any of the rents of sums of money reserved by or payable under the specified leases . . .

It seems to me again impossible to suggest that there is anything against which the plaintiffs are entitled to say that they should be indemnified. If I am right in the view which I have taken, when the plaintiffs have received the full rent, less the deduction permitted and provided for by the Act, both the defendants have fully performed the obligations which are contained in this lease to pay the rent in question, and the fact that there has been a deduction does not give the plaintiffs any right to claim any payment from either of the defendants on the ground that it is an outgoing or anything of that sort, nor on the ground that there has been a failure to perform and observe the covenants and stipulations by the lessees.

In my judgment, the answer to that part of the case must be that, by paying, or seeing that the plaintiffs are paid, the full amount of the rent, less the deduction permitted by the Act, the defendants have carried out to the full the obligation which was on both of them to pay the rent which was reserved under the lease, and so the plaintiffs are not entitled to make any further claim in respect of the rent payable under the lease. As I have said, the case seems to me to be totally different from that of a lease and sublease. There, as I have pointed out, there are two rents which need not necessarily be the same. They are payable under two different documents, and the fact that, in the case of a sublease, the sublessee is entitled, having been the mine-owner, to deduct from the rent payable to the royalty-owner (in that case, the sublessor), though the sublessor is not entitled to pass on that deduction when he comes to pay his rent under his lease, seems to me really to have no bearing upon the facts of this particular case. I can see no ground upon which the plaintiffs are entitled to claim the relief which they seek in this particular case. In my judgment, there should be a declaration accordingly.

Solicitors : *Johnson, Weatherall, Sturt & Hardy*, agents for *Parker Rhodes, Cockburn & Co.*, Rotherham (for the plaintiffs) ; *Field, Roscoe & Co.*, agents for *Davies, Sanders & Co.*, Nottingham (for the defendants).

[Reported by *IRENE G. R. MOSES*, *Barrister-at-Law.*]

FORESTAL LAND, TIMBER AND RAILWAYS CO., LTD. v. RICKARDS.

MIDDOWS, LTD. v. ROBERTSON.

W. W. HOWARD BROTHERS & CO., LTD. v. KANN.

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.), **November 4, 5, 6, 7, 8, 25, 1940.**]

Insurance—Marine insurance—Cargo—War—Government decree controlling shipping—Ship attempting to return to enemy country in obedience to decree—Scuttling of ship—Frustration of voyage—Liability of insurers of cargo.

A cargo in a German-owned steamship was insured for a voyage from South American ports to Hong Kong or Shanghai, including transshipment at Durban. The policy was in the usual Lloyd's form, but expressly included the Institute War Clauses and the following clause: "Including damage by hook, oil, sweat, heat, fresh water and other cargo (liquid or solid), theft, pilferage and non-delivery . . ." The policy was expressly warranted free of any claim based upon loss or frustration of the insured voyage or adventure caused by arrests, restraints or detainment of kings, princes or peoples. The vessel arrived at Rio on Aug. 25, 1939. War was declared on Sept. 3, 1939. The vessel sailed from Rio on Sept. 6, 1939, and on Sept. 29, 1939, in the presence of a British warship, she was scuttled by her master and crew off the Faroe Islands. At all times after Aug. 16, 1939, the German government had taken control of all German-owned merchant shipping, and had given orders to all such vessels and their masters to take refuge in neutral ports or return to Germany, or, as a last resort, to scuttle their vessels. The plaintiffs claimed for a total loss, either actual when the ship was scuttled or constructive when the ship was at Rio and war broke out, or, at the latest, when she sailed from Rio. Under another policy in similar terms, goods were shipped on a German-owned vessel for carriage from Bremen to Cape Town. On a normal voyage, the vessel would have reached Cape Town about Sept. 12, 1939, but, having arrived at Las Palmas on Aug. 29, 1939, the vessel then sailed for Vigo, Spain, where she arrived on Sept. 1, 1939. She left Vigo on Feb. 10, 1940, and arrived in Hamburg on Mar. 5, 1940. Under a further policy in similar terms, goods were shipped on a German-owned vessel for carriage from Bunbury, Australia, to London. The ship passed the Cape of Good Hope on Aug. 18, 1939, and, on a normal voyage, would have reached London about Sept. 16, 1939. She sheltered at the neutral port of Bissao in Portuguese Guinea on Sept. 6, 1939. She left there on Oct. 13, 1939, and was scuttled in the presence of a French warship on Oct. 16, 1939. Although no notice of abandonment was given in each case, the underwriters agreed to waive the absence of such notice:—

Held: since the insured had in each case suffered a constructive total loss of the goods through the action of the German government they were entitled to recover for such loss under the respective policies of insurance. On the true construction of the contracts, the frustration clause afforded no defence to the underwriters, since it applied only to loss of the voyage. If there has been a constructive total loss of the goods within the meaning of the Marine Insurance Act, 1906, s. 60, the mere fact that there has also been a loss of the voyage cannot exclude the right of recovery for the former loss.

Decision of HILBERY, J. ([1940] 4 All E.R. 96) reversed.

[EDITORIAL NOTE.] The real contest in this case in the Court of Appeal has been on the proper construction of the frustration clause in a policy of marine insurance. This clause was inserted in such policies to avoid the construction put upon them in *Sanday's* case (1), where an insurer recovered although there was no loss

of the goods. Basing his judgment on passages used in deciding that case, HILBERY, J., took the view that, in a policy of marine insurance of goods, the subject-matter of the insurance is the adventure of the goods on the voyage and, therefore, in dealing with the subject-matter of such insurance, the goods cannot be separated from the voyage. The Court of Appeal, in rejecting this view, state that the law has always been that such an insurance covers both the goods and the adventure, and that, apart from special clauses, the loss of either gives rise to a claim against the insurers. The effect of the insertion of the frustration clause is to avoid the claim in respect of the loss of adventure, but not that in respect of the loss of goods.

AS TO WAR RISKS, see HALSBURY, Hailsham Edn., Vol. 18, pp. 314-319, paras. 439-443; and FOR CASES, see DIGEST, Vol. 29, pp. 216-219, Nos. 1720-1758.]

Cases referred to :

(1) *British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co.*, [1916] 1 A.C. 650; 29 Digest 276, 2236; 85 L.J.K.B. 550; 114 L.T. 521; affg. S.C. *sub nom. Sanday & Co. v. British & Foreign Marine Insurance Co.*, [1915] 2 K.B. 781.

(2) *Rodoconachi v. Elliott* (1874), L.R. 9 C.P. 518; 29 Digest 218, 1747; 43 L.J.C.P. 255; 31 L.T. 239.

(3) *Miller v. Law Accident Insurance Co.*, [1903] 1 K.B. 712; 29 Digest 219, 1748; 72 L.J.K.B. 428; 88 L.T. 370.

(4) *Lewis v. Rucker* (1761), 2 Burr. 1167; 29 Digest 123, 760.

(5) *Elton v. Brogden* (1747), 2 Stra. 1264; 29 Digest 152, 1063.

(6) *Barker v. Blakes* (1808), 9 East, 283; 29 Digest 284, 2315.

APPEALS by the plaintiffs from a judgment of HILBERY, J., dated Sept. 6, 1940, and reported [1940] 4 All E.R. 96, where the facts are fully set out.

Sir Robert Aske, K.C., and *Cyril T. R. Miller* for the appellants.

G. St. Clair Pilcher, K.C., and *A. J. Hodgson* for the respondents.

Aske, K.C.: There was a constructive loss as soon as the captain decided to hold the goods to the order of the German government. That took place before any change of voyage or loss of the adventure. [Counsel referred to the Marine Insurance Act, 1906, s. 45.] Abandonment of the voyage is a change of voyage. The ship never sailed on the contemplated voyage at all. An involuntary change of voyage does not avoid the policy. There is no difference between a deviation and a change of voyage. [Counsel referred to *Elton v. Brogden* (5)]. *British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co.* (1) supports this submission.

Pilcher, K.C.: The claim here is for a constructive total loss. The only conditions in which there can be a constructive total loss are those in the Marine Insurance Act, 1906, s. 57. The plaintiffs were not "irretrievably" deprived of their goods. There is in the English law of marine insurance no such conception as a constructive total loss of the goods themselves. The subject-matter of every policy on goods is the venture only, and, where a constructive total loss of goods occurs, it is through the non-arrival of goods at their destination and the consequent loss of markets. There have been many German ships which have not had time to scuttle themselves. The ship might have

been captured by a British warship and the goods recovered. The plaintiffs must rely on a constructive total loss. Here, on the facts, the goods were not irretrievably lost. [Counsel referred to the Marine Insurance Act, 1906, s. 60, and *Barker v. Blakes* (6).]

- A SCOTT, L.J. : The decision in all three of these appeals, which we heard together, turns on the same main point of law, and it will be convenient, therefore, to summarise the common position. The claims are by British cargo-owners against Lloyd's underwriters on voyage policies, said to be in what is called (but not proved to be) "standard form," with various clauses attached and incorporated in the policy.
- B Each policy covers war risks as well as marine risks, and each policy also contains the now common form of the so-called "frustration clause," which was invented to exempt underwriters of voyage policies from the kind of liability which was authoritatively established by the decision
- C in the House of Lords in *British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co.* (1). In that case, two British ships carrying goods under bills of lading with German destinations were, upon the outbreak of war in Aug., 1914, diverted in the English Channel, one by a French cruiser and the other by British orders, to British ports, where
- D they delivered their cargoes intact to the insured British owners at those ports. The assured gave notice of abandonment, and issued writs claiming for a constructive total loss. The House, affirming BAILHACHE, J., and a majority of the Court of Appeal, held that, though the goods were intact, the adventure had been lost, that the "subject-matter" of the policy was the safe arrival of the goods at the end of
- E the voyage—that is, the adventure—that in English law the loss of the voyage entitled the assured on goods, after giving due notice of abandonment, to recover for a constructive total loss, and that the Marine Insurance Act, 1906, had not altered that well-recognised rule of law.
- F The clause then first introduced into Lloyd's "standard" form of voyage policy is as follows :

Warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detentions of kings, princes, peoples, usurpers or persons attempting to usurp power.

- G The defendant underwriters pleaded the clause as a bar to all three actions, and the judge held that it was a good defence. We were informed that the outbreak of the present war had led to many insurance claims, and that the three cases before us had been selected, by agreement between underwriters and the representatives of claimants, as
- H typical, and that the underwriters had agreed to pay all costs in any event, up to and including the House of Lords. Naturally the underwriters wanted to get as much legal enlightenment as they could for their money. With that object, the pleadings, we were told, were settled by opposing counsel in consultation. The material facts were all agreed, and, although no notices of abandonment were given, the underwriters

agreed, in view of the late dates at which the assured obtained sufficient information to give such notices, to waive the absence of notice, and accordingly conceded that each of the three cases was to be argued on the assumption that due notice had been given at the proper time. The result was that many questions of law which were argued below on both sides were only contingently, or even remotely, relevant, including some which turned on obscure, or possibly conflicting, provisions contained in the congeries of attached clauses. The judge with reluctance dealt with several of these secondary contentions of both sides, although some of them were rendered irrelevant by his decision that the actions were defeated by the frustration clause. However, in the view which I take—namely, that that clause affords no defence in these actions—nearly all of those secondary issues cease to have any materiality at all. A

Agreed statements of facts were before the court below in each case, with one or two minor amendments, together with the waiver and admission by underwriters as to notice of abandonment, which I have already mentioned. Each of the three original statements appears *in extenso* in the judge's judgment, and it is not necessary to repeat them. The dominant fact was that the German master of each German ship received from his own government at least a fortnight before Sept. 3, 1939, the day when war was declared, orders in furtherance of German war policy to take refuge with his ship in a neutral port, and, if possible, to return to Germany with its cargo, or, as a last resort, to scuttle his vessel. These orders were duly carried out by each of the three masters. B C D

The Minden sailed from Buenos Aires on Aug. 16 on a voyage to Durban, where the plaintiffs' goods, quebracho wood extract (used in tanning), were to be transhipped to Hong Kong option Shanghai. The vessel's course was due east, but, on Aug. 24, she arrived at Santos, having left her course and turned north-west. She left Santos the same day, and arrived at Rio on Aug. 25. She stayed there till Sept. 6, three days after the outbreak of war, and then sailed, evidently in order to return to Germany. On Sept. 29, she was intercepted by a British cruiser off the Faroe Islands, and, still acting in obedience to his orders, the master then scuttled her. E F

The Halle, with a parcel of jarrah boards, bound from Bunbury, Australia, to London, *via* the Cape, called at Durban on Aug. 16, and passed Cape Town on Aug. 18. On Sept. 6, she took refuge at the neutral port of Bissao in Portuguese Guinea, and stayed there till Oct. 13. Three days later, the master, in the presence of a French cruiser, scuttled her. G

The Wangoni, with a parcel of Bristolite boards, the property in which had passed to the plaintiffs, was bound from Bremen to South Africa, the bill of lading being dated Aug. 12. Cape Town was her first port of call. On Aug. 29, she put into Las Palmas, but the same day she sailed back on her tracks, and on Sept. 1 she took refuge at Vigo. H

There she stayed till Feb. 10, 1940, when she sailed, and succeeded in reaching Hamburg on Mar. 5, 1940.

From these facts, the inference is, to my mind, irresistible. In each case, the master was acting—as no doubt was his bounden duty in German law—in strict obedience to the orders which he had received.

- A The departure from the direct route of the bill of lading voyage was in each case made in order to take the British-owned cargo as well as the German-owned ship to a port of refuge. The stay in that port was in pursuance of the plan of the German government. The departure from that port was equally the act of the German government through
- B its agent, as was also, in the case of the Minden and in that of the Halle, the act of scuttling, and, in the case of the Wangoni, the act of bringing the ship and cargo to Hamburg and there holding it to the order of the German government. In each case, when the ship was diverted from its normal contractual course towards a port of refuge, the German
- C government through the master received actual possession of the British-owned goods, and thereafter retained that possession. When, pursuant to those orders, the ship left its neutral port, if not before, that government was guilty, if I may apply a metaphor from English common law, of converting the goods to its own use. When that happened, if not
- D before, the result was for the plaintiff cargo-owners under each policy a loss, not merely of the voyage or adventure, but also of the goods themselves, and that loss was one to which there attached the requisite attributes of a constructive total loss as laid down in the Marine Insurance Act, 1906, s. 60, provided always that the loss was proximately caused
- E by a peril within the policy. If it was so caused, it is one in respect of which the assured are, in my opinion, entitled to recover, wholly apart from any considerations of the loss of the voyage.

It only remains, therefore, to consider the list of perils to see if that loss was covered. As the policies differ, each must be considered separately.

- F In the case of the Minden, the policy itself—that is, apart from its attached clauses and the frustration clause in italics—was, as far as the black ink part of the printed form goes, in the same form as that in the schedule to the Act. It contained the word “enemies” and the general words. There had been in the printed and attached set of
- G “Clauses for Shipments from South America” (No. 17A) an f.c. and s. clause, but it was deleted. The Institute War Clauses, cl. 1, also printed and attached, contained two subclauses, (a) and (b), which, I think, ought to have been struck out as superfluous, in view of the absence from the policy itself of any f.c. and s. warranty, and in view of the
- H deletion from the “South American clauses,” to which I have just referred. Both (a) and (b), however, were left in. I do not think that they have any effect at all, but it was argued alternatively for the appellants that the subclauses introduced perils not covered by the word “enemies,” and that, if the facts did not disclose a loss by “enemies,” the words in clause 1 which purported to make the policy cover all the indi-

vidual perils named in (a), and inflated or extended the f.c. and s. clause, entitled the appellants to recover. I do not think that that is a legitimate construction of subclause (a), because the clause purports to bring back into the policy only perils already in the policy but excluded by the f.c. and s. warranty. Subclause (b) clearly adds nothing to the word "enemies" already in the "standard" form. Nothing else in the Institute War Clauses deserves even mention in the present context, and in the Institute Strike Clauses and in the typed clause there is nothing which has any relevance whatever. So far as concerns the question of insured perils, the policies in the other two cases are not less favourable to the assured than the Minden policy, for they are professedly on all risks. A B

The argument of counsel for the respondent underwriters was that all three claims were "based upon loss of the insured voyage," and, therefore, barred by the frustration clause. On being asked by the court whether he meant that they were claims which (i) were capable of being based on loss of voyage, (ii) were in fact based on loss of voyage, or (iii) could only be based on loss of voyage, he at first said that he relied on (iii); or, in the alternative, on (i), but on further reflection he submitted that (ii) was the true proposition. I am satisfied that contention (i) is erroneous in law. If there is a constructive total loss of the goods themselves within sect. 60, the mere fact that there is also a loss of the voyage cannot exclude the right of recovery for the former, and I know of no justification for such a contention in any judicial opinion expressed in any case, whether as the ground of decision or merely *obiter*. In my opinion, it is only where, on the facts, no claim can be put forward except for the loss of the venture that the frustration clause has any application. In the present case, no claim was put forward for loss of the venture. The claim made, and rightly made, in respect of what I have called the conversion of the goods by the German government was a claim for the loss of the goods themselves. F When each ship sailed from its port of refuge for Germany, in my opinion, there was at that moment such "deprivation of the goods without likelihood of recovery" as to constitute a constructive total loss within sect. 60. Whether or not it amounted to an "irretrievable deprivation" so as to constitute an actual total loss within sect. 57 it is unnecessary G to decide, or even to consider.

An argument was addressed to HILBERY, J., and to some extent to us, on behalf of the underwriters, that there is in the English law of marine insurance no such conception as a constructive total loss of the goods themselves, but that the "subject-matter" of every policy on goods is the venture only, and that, in every case where a constructive total loss of goods happens, it is through the non-arrival of the goods at their destination, or, in other words, through loss of market. The cases of loss of venture such as *Rodoconachi v. Elliott* (2) or *Miller v. Law Accident Insurance Co.* (3) or *British & Foreign Marine Insurance Co.*, H

Ltd. v. Sanday (Samuel) & Co. (1), to which we were referred, are all cases where the goods remained in the possession of the bailors through their bailees, the carriers, and the only loss suffered by the insured bailors was the loss of market or of voyage. No judge, as far as I know, has ever countenanced the proposition that in insurance on goods the

- A only constructive total loss recognised in law, either before or since the passing of the Act, is loss of the venture. In the case of certain perils enumerated in the ordinary Lloyd's policy scheduled to the Act, it can hardly be doubted that a constructive total loss of the goods themselves may arise when they are taken wholly out of the possession of the assured
- B and his bailee—for example, pirates, rovers or thieves. If there can be an actual total loss in such cases through “irretrievable deprivation” under sect. 57, I can see no reason why the law should not recognise a constructive total loss under sect. 60 (1) where the goods are “reasonably abandoned on account of their actual loss appearing unavoidable,” or
- C under subsect. (2) “where it is unlikely that the assured can recover the goods” or “the cost of recovering them would exceed their value when recovered.” For these reasons, I think that the above argument that the only constructive total loss of goods known to the law is where the loss of the venture takes place is untenable, and that the appellants
- D are entitled to succeed. I have not drawn attention to the assumption, implicit in what I have already said, that the policy was in each case still in force at the moment when the ship left its neutral port of refuge. As far as I can gather, that assumption was hardly challenged below, or before us, but I ought perhaps to deal with the point. As the three
- E policies differ in the relevant wording, I will discuss them separately.

In the case of the *Minden*, No. II of the “Rules of Bill of Lading” gave the ship :

... liberty to call at any ports in or out of the customary or advertised route in any rotation and for any purpose.

- F That clause, by its last words especially, I think, authorised the deviation to Rio. Clause 10 of the “Clauses for shipments from South America,” attached to the policy, included bill of lading liberties, and cl. 13 repeated the liberty, adding “for all purposes whether necessary or otherwise.”
- G Clause 18 made cl. 10 and 12 paramount. Down to the outbreak of war on Sept. 3, 1939, the deviation of the *Minden* was thus covered by both the bill of lading and the policy. In the case of the *Halle*, a war clause attached to the bill of lading provided that, in addition to other liberties, the carrier might :

- H ... in the event of the imminence ... of war ... between any nations [or] in consequence of measures taken by any government in consequence of or in connection with the above matters ...

The clause does not say in terms what the carrier might do, for it is not completed grammatically, but the next sentence says :

... anything done by reason of or in compliance with the clause is within the contract voyage.

The deviation towards Bissao is thus covered, but, as the ship did not reach Bissao till Sept. 6, it is necessary to consider the position between Sept. 3 and Sept. 6. As after Sept. 3 there was nothing which the British cargo-owner could do to cause the master of the Halle to alter the course of his ship or to prevent him from going on to Bissao, I think that the ship must be regarded as still within the bill of lading liberty, and, as cl. 2 of the "Timber Trade Federation clauses" attached to the policy included all "bill of lading liberties," it follows that the policy was still in force, and that the insurance position was thus the same as in the case of the Minden. In the case of the Wangoni, a clause attached to the bill of lading contained this provision:

If one of the following incidents or one of the following measures occurs or threatens to occur, that is to say war between any peoples; civil war; prohibitions, restrictions or control by any government of traffic, trade or by any other means, with any country from which or to which the ship normally sails; control or disposal by any government or authority of the use or movement of the ship (or) of insulated or other holds of the ship, the shipowner (or his representative) is entitled, if he considers that the ship, her master, officers, crew, passengers or cargo are subject either wholly or in part, as a result of the incidents or measures referred to above, to loss, damage, contravention or detention, or to suffer delay, to alter the journey either before or after its commencement, or to vary the anticipated, agreed or usual voyage, or to detain the ship or to delay the voyage.

There was no general inclusion in the policy of bill of lading liberties, but they were "held covered at a premium to be arranged." If the assured had to rely on that clause alone, a suitable premium would have to be fixed for the extra risk, if any, of returning to Vigo. Except for this difference, the position in regard to the Wangoni is the same as that in regard to the other two ships.

I have discussed the policy voyage in each case, but in truth I do not think that the appellants' rights of recovery depend on provisions as to deviation. Apart from deviation liberties, at the start of the deviations the cargoes were, under the orders of the German government, merely under restraint of princes, and the deprivation was merely contingent, but, if those orders compelled the masters at any time finally to abandon the commercial voyages, it is, I think, a necessary inference from the facts that the German government then *ipso facto* took absolute, and not conditional, possession of the goods, and thereafter deprived the appellants of their possession continuously until, in two cases, they went to the bottom, and, in the third, the cargo reached the hands of the German government in Hamburg. If the assured had given notice of abandonment on Sept. 3, there would then have been a constructive total loss of the goods, and we are to decide the appeals as if that had been done. Upon the other issues discussed here or below as alternative contentions raised by one side or the other I say nothing, as they are rendered immaterial by the above decisions.

It follows that in all three cases the appellants are entitled to recover, and that all three appeals must be allowed and judgment entered in each action for the appropriate sum of money. In view of the respondents' agreement to pay all costs, there will be no order, except

for taxation of all the appellants' costs here and below. There will be leave to appeal to the House of Lords.

A MACKINNON, L.J.: I have written three separate judgments in each of these cases. As to the case of the *Minden*, it is a claim to recover an alleged loss under a policy of marine insurance. All actions normally involve questions of fact and questions as to the law applicable to those facts. In this case, there is no dispute as to the facts. Very sensibly, they have been set out in an agreed statement.

B As to the law, the only questions involved are as to the proper construction of the contract sued upon. There are two massive volumes of ARNOULD ON MARINE INSURANCE, and they now contain over 1,800 pages, and the Marine Insurance Act, 1906, is entitled: "An Act to codify the law relating to marine insurance." The truth is that this law of marine insurance is nothing more than a collection of rules for the construction of the ancient form of policy, and such additions as are from time to time annexed to it. The ancient form dates back at least to the sixteenth century, and it is a document which Sir Frederick Pollock characterised, with justifiable asperity, as "clumsy, imperfect, and obscure."

C Many of the imperfections and obscurities had to be resolved by LORD MANSFIELD, C.J., with the assistance of his famous special jury-men. A striking example of his task in that respect is *Lewis v. Rucker* (4). The question arose as to the proper method of assessing a particular average loss of goods. The obvious thing would have been to see what the contract of the parties provided, but it provided nothing whatever. E The assured put forward one method of assessment, and the underwriters put forward another. LORD MANSFIELD, C.J., decided for the latter, saying, at p. 1169:

F The special jury (amongst whom there were many knowing and considerable merchants,) found the defendant's rule of estimation, to be right and gave their verdict for him. They understood the question very well, and knew more of the subject of it than anybody else present.

G The rule so settled is now embodied in the Marine Insurance Act, 1906, s. 71, but in truth it is an implied term in the old form of policy, added to its imperfect expression by the practice of assured and underwriters, as found by the knowing and considerable merchants in 1761.

H Innumerable clauses have from time to time been devised to supplement the ancient form. Unhappily, tradition seems to have caused them also in very many cases to be "clumsy, imperfect, and obscure," and the fact that ARNOULD ON MARINE INSURANCE now covers 1,800 pages is largely the result of that tradition. Oddly enough, the tradition has even infected the legislature with a microbe of inaccuracy. In 1746, an Act was passed which made re-insurance illegal, except in the case where "the assurer shall be insolvent, become a bankrupt, or die." It is inconceivable that an insolvent underwriter should desire to re-insure,

and obviously the evil aimed at was double insurance by the assured. "Re-insurance," however, had then its present well-known meaning, and the draftsman of the Act used the wrong word in order to maintain the tradition of obscurity. I hope this irrelevant exordium is venial. I only wish to emphasise that, when the facts in this case are agreed, the sole question is whether, upon the true construction of their contract, **A** the assured can claim to be paid a certain sum by the underwriter.

The material terms of their contract are these. The insured perils include :

Men of war, enemies, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes and people . . . and all other perils losses and misfortunes that have or shall come to the hurt detriment and damage of the said goods and merchandises. **B**

This list of perils in the ancient form is possibly enlarged by the Institute War Clauses, cl. 1, which provides as follows :

This policy covers . . . loss of or damage to the property hereby insured caused by: (1) hostilities, warlike operations. . . . (2) mines, torpedoes, bombs or other engines of war. **C**

Lastly, there is the clause upon which most of the argument before us has turned :

This policy is warranted free of any claim based upon loss of, or frustration of, the insured voyage or venture caused by arrests, restraints or detainments of kings, princes, peoples, usurpers or persons attempting to usurp power. **D**

Counsel have called this the frustration clause, and I will use that name to refer to it hereafter.

As a matter of the construction of this contract, my conclusion, upon **E** the agreed facts, is as follows. If the goods were still covered by the policy, there was a constructive total loss when the German captain at Rio determined to obey the instructions of his government, hold the goods as the subject and servant of that government (thereby ceasing to hold them as the bailee of the assured), and carry them, if he could, **F** to a German port, or sink them by scuttling his ship if intercepted by a British or allied vessel. It is possible that the moment of that constructive total loss was not when the master determined in his mind so to obey and act, but when he acted upon such determination by weighing anchor at Rio to sail, if he could, to Germany. However, this is an **G** immaterial distinction. HILBERY, J., seems to agree with me in this conclusion, for he says, at p. 101 :

When he [the captain] actually sailed for Germany, however, we have an overt act from which we can draw certain inferences. In thus acting, he was restraining or detaining the plaintiffs' goods. He was taking them and holding them under and to the orders of the German government. The orders of the German government and his acts done thereunder were, in the circumstances, a restraint of princes **H** or people.

I think this is right. The result would seem to be that, if the policy was still in force, there should be a right of the assured to claim for a constructive total loss. However, the judge has decided in favour of

the defendant, and he has done so because of his view as to the effect of the frustration clause. That view, I think, is entirely erroneous. The frustration clause is obviously designed to counteract the effect of *British & Foreign Marine Insurance Co., Ltd. v. Sanday (Samuel) & Co.* (1), in which case the insured goods were safely in the possession of
 A the assured, but they were held entitled to recover for a constructive total loss because the insured voyage had been put an end to by an insured peril. The clause frees the underwriters "from any claim based upon loss of the insured voyage." The assured in the present case makes no claim based on such a loss. He makes a simple claim for the loss of
 B his goods by his being deprived of them. The truth is that the argument for the defendant requires one to read the clause as meaning "free of any claim which on the facts might be based on loss of the insured voyage." I am satisfied, however, that its proper meaning must be "free of any claim which is in fact based, and can only be based, upon
 C loss of the insured voyage."

The judge, however, has held that the claim is barred by this clause. He does so acting upon the idea that, to establish any claim on a policy upon goods, the assured must always allege a loss of the insured voyage as well as loss of, or damage to, the goods. Elementary considerations,
 D I think, must demonstrate the error of that idea. If, on an ordinary policy on goods, without any added clause, the goods arrive at their insured destination but on the voyage have been damaged by sea perils, so that their damaged arrived value is half the sound value of like goods, the assured obviously has a claim for half the insured value. HILBERY, J.,
 E however, would apparently give him nothing, because the goods have all arrived, and he cannot assert any loss of the insured voyage. The radical error appears in the judgment of HILBERY, J., at p. 103 :

The policy being a marine insurance policy, the subject-matter of the insurance is of the adventure of the goods on the voyage. The goods are not insured apart
 F from the voyage. It is the voyaging with the goods or the goods upon the voyage which is the subject-matter of the contract.

The subject-matter of the contract is, of course, the goods, and they are insured against loss or damage by insured perils, but, even if the goods are not so lost or damaged, there is an additional insurance against
 G the loss of their voyage. The judge considers this to be not an additional risk, but an essential part of it in every case, whereas both of the two quotations from BAILHACHE, J., and from LORD READING, L.C.J., which he cites just afterwards, make it clear that this is only an additional risk. BAILHACHE, J., says, at p. 832 :

H It is not true that in a policy of this kind the goods only are insured. Their safe transportation to and arrival at the port of destination is also insured.

Almost identical words are used by LORD READING, L.C.J.

I think that it is unnecessary to discuss further this elementary misconception as to the nature of a policy upon goods. I would only add

that, if the view of the judge were correct, the assured under this policy must have accepted the most fatuous and worthless contract ever made by a sane man. The policy solemnly insures his goods against loss by war perils and his being thereby deprived of them, but the frustration clause, upon the judge's reasoning, would, in every case of such deprivation which I can imagine, make that promise absolutely nugatory. A

I said earlier that there was a constructive total loss of the goods at Rio, if the policy was still effective. If the insured voyage were simply from the River Plate to Shanghai or Hong Kong, *via* Durban, there would have been a deviation when the master turned back from his easterly course to make for Santos, and there would have been a change of voyage when he weighed anchor to go from Rio to Germany, or as near thereto as he could safely get. Under this policy, there is no question of either this deviation or the change of voyage discharging the underwriter (under sect. 46 or sect. 45 of the Act) from liability, for the attached clauses twice over provide that the assured shall be held covered in case of deviation or change of voyage at a premium to be arranged. The only question, therefore, is whether the defendant is entitled, on his counterclaim, to an extra premium for either the deviation or the change of voyage, or for both. B

Deviation is a departure from that *via* which is expressly or impliedly specified or permitted by the policy. The *via* specified in this policy is (a) at and from any place in South America to Hong Kong or Shanghai, direct or indirect, and (b) including all liberties *as per* contract of affreightment. As the latter words (in the Clauses for shipments from South America) permit a variation of the specified voyage, pursuant to liberties in the contract of affreightment, without any extra premium, they appear to conflict with, but must override, the clause in the Institute War Clauses which provides : C

Held covered at a premium to be arranged in case of deviation . . . by reason of the exercise of any liberty granted to the ship-owner by the contract of affreightment. D

The lengthy war clause attached to the bill of lading, I think, clearly gave the ship-owner liberty to go to Santos. Upon this state of the contract in the policy, I think that the going to Santos was a permitted deviation, and, therefore, excused under sect. 49 (1) (a) of the Act, E but, quite apart from that, I think that it is also excused under sect. 49 (1) (b) as being "caused by circumstances beyond the control of the master"—namely, by the orders of his own government. In the result, I think that no extra premium can be claimed for the deviation. Change of voyage is defined in sect. 45 (1). This no doubt reproduces the effect of decided cases. I asked counsel if they knew of any case which answered the question: "Whose is the *voluntas* referred to in the words 'voluntarily changed' ? Is it that of the assured or that of the captain ?" They knew of none. I do not think that I need pursue the inquiry, for, whether the words refer to the assured or to the F

captain, the act of leaving Rio for Germany was not a "voluntary change" from the voyage to Shanghai. It was one made under compulsion. Therefore, I think that no extra premium is due for change of voyage.

Lastly, I said that this was a constructive total loss. Normally there cannot be a claim for that type of loss unless notice of abandonment has been given. The defendant does not seek to rely on the absence of such notice, and manifestly he could not, for it is agreed that the assured knew nothing of the fate of their goods until after the vessel was scuttled off the Faroe Islands. Therefore, pursuant to sect. 62 (3), (7), of the Act, the lack of notice would be excused, even if sect. 62 (8) did not apply. In the result, I think that this appeal succeeds, and judgment should be entered for the plaintiffs for £197 ls. 3d., with interest from the date of the writ. I understand that there is an agreement between the parties as to costs, and no order about them is desired.

In the case of the Wangoni, HILBERY, J., decided in favour of the defendant upon his view of the effect of the frustration clause. For the reasons I gave in the case of the Minden, I think that he was wrong. That which I ventured to call the elementary misconception as to the nature of a policy on goods seems to be even more disastrously asserted in this case, at p. 118:

For the reasons which I gave in the case of the Minden, the adventure the subject-matter of the insurance being frustrated when the master sailed from Vigo, the subject-matter of the policy was gone, and the underwriters were no longer at risk. . . .

If this were correct, it becomes even more manifest that, when the assured paid his premium, he was receiving in return a policy which in no event could be worth more than the paper on which it was written. If the goods arrived at the insured destination damaged on the way by insured perils, he could recover nothing, since he could not assert any loss of "the adventure the subject-matter of the insurance." If they were lost on the voyage by reason of insured perils, he could recover nothing, by reason of the operation of the frustration clause. In no conceivable event could he ever recover a penny. The construction of a commercial contract leading to such a result seems unlikely to be correct, except in a community consisting of fools and knaves.

The principles which I discussed in the case of the Minden seem to me to apply equally in this case, and to have the same result. There is, however, one factor in this case which does not arise in the case of the Minden or in the remaining case of the Halle. That arises from the communications sent by the shipowners, through neutral agents, offering the release of the goods upon certain suggested terms. It was argued that, having regard to those communications, the assured could not assert a constructive total loss. He could assert that he was for the time being "deprived of the possession of his goods by a peril insured

against," but he could not further establish, within the provisions of sect. 60 (2) (i) of the Act, that :

. . . it was unlikely that he could recover the goods, or that the cost of recovering the goods would exceed their value when recovered.

One factor in estimating the chances of such recovery, or its expense, is, I think, not to be disregarded. The assured wrote their letter of Oct. 11, 1939, to the insurance brokers, and the brokers showed it to the underwriters. The policy, of course, contained the waiver clause :

And it is especially agreed that no acts of the insurer . . . in recovering the property insured . . . shall be considered as . . . an acceptance of abandonment.

The underwriters, as I cannot doubt, with all the organisation of the corporation of Lloyds and its agents at their command, must have been at least as able to recover the goods, if that was commercially practicable, as Middows, Ltd., if not more able. It is not without significance that, on being shown the letter of Oct. 11, the underwriters merely indorsed upon it : " Act as if uninsured." This fact is not included in the agreed statement, but was told us by counsel.

I do not think that it is necessary to examine the facts and correspondence in detail. The conclusion to which I come is that it was at all material times certain that the cost of recovering these goods (of which the insured value was only £24) would exceed their value when recovered. In the result, I think that the plaintiffs were entitled to claim a constructive total loss. As to notice of abandonment, the defendant takes no point. Probably the communication to the underwriters of the letter of Oct. 11 would suffice as such notice, under sect. 62 (2) of the Act. As to extra premium for deviation or change of voyage, what I said in the case of the *Minden* is sufficient. In the result, I think that this appeal should be allowed, and judgment entered for the plaintiffs for 6s. 8d., with interest from the date of the writ.

In the case of the *Halle*, the facts are very similar to those in the first case about the *Minden*, though, of course, the ports and places are different. The policy is not in precisely the same terms, but I do not think that there is any part of it which raises different considerations. The frustration clause is identical. The judge was of opinion that there was a constructive total loss when the master of the *Halle* sailed from Bissao. I agree with him. However, he has gone on to hold that the claim for such loss is barred by the frustration clause, for the reasons expounded by him in the case of the *Minden*. In my judgment in the case of the *Minden* and in that of the *Wangoni*, I have explained why I cannot agree with this part of his judgment. The absence of notice of abandonment was not relied upon by the defendant. As to extra premium for deviation or change of voyage, I think that what I said in the case of the *Minden* applies here also. In the result, I think that this appeal should also be allowed and judgment entered for the plaintiffs for £3 7s. 9d., with interest from the date of the writ.

LUXMOORE, L.J.: I have had the opportunity of reading and considering the judgments which have just been read by SCOTT and MACKINNON, L.JJ., and I find myself in complete agreement with the conclusions at which they have arrived and the reasons for those decisions. In the circumstances, I do not think that any useful purpose
 A would be served if I were to deliver a separate judgment. I therefore content myself with saying that I agree that the three appeals should be allowed for the reasons stated by SCOTT and MACKINNON, L.JJ.

Appeals allowed. No order as to costs. Leave to appeal to the House of Lords.

B Solicitors: *Slaughter & May* (for the appellants in the first appeal); *William A. Crump & Son* (for the appellants in the second and third appeals); *Ince, Roscoe, Wilson & Glover* (for all the respondents).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

C

ELLIS & SONS THIRD AMALGAMATED PROPERTIES, LTD. v. JACKSON.

KING'S BENCH DIVISION (Lawrence, J.), **October 10, 1940.]**

D *Income Tax—Schedule A—Persons chargeable—Assessment upon vendor—Purchaser entitled to conveyance of property at expiration of 30 years—Instalments sufficient to cover capital cost of property reserved as rent—Relationship of landlord and tenant—Owner-occupier—Income Tax Act, 1918 (c. 40), Sched. A, No. VII, r. 8 (b).*

E The appellant company, which had previously been a society registered under the Industrial and Provident Societies Acts, 1893 to 1928, let property to an occupier at a rental of 14s. 8d. per week. The weekly rental was calculated so as to include a sum which, accumulated at 4½ per cent. per annum compound interest, would be sufficient to recoup the company for the purchase price of the property at the end of 30 years. The occupier became a member of the company, and was
 F entitled, at the expiration of 30 years, to have the property conveyed to him. The tenancy agreement gave either party the right to terminate the tenancy on giving not less than 7 days' notice, and it also provided that the tenant's rights as a member of the company should not prejudice or affect in any way the relationship of landlord and tenant created by the agreement. An assessment under the Income Tax Act, 1918, Sched. A, No. VII, r. 8 (b), was made upon the company
 G in respect of the property as land let for a period of less than one year. It was contended on behalf of the company that, in the circumstances, the occupier became an owner-occupier, and that the assessment should be made upon him as owner:—

H **HELD:** the property was let for a period of less than one year within the meaning of the Income Tax Act, 1918, Sched. A, No. VII, r. 8 (b), and the relationship of landlord and tenant existed between the company and the occupier. The assessment had, therefore, been rightly made upon the company as landlord under r. 8 (b).

[EDITORIAL NOTE.] The question here is whether, for the purposes of the Schedule A assessment, the relationship between the parties is that of vendor and purchaser or of landlord and tenant. There are two methods of purchasing a property by instalments. The first is to take an immediate conveyance and then give a mortgage, generally to a building society, for the balance of the purchase-

money. The second is to pay the purchase price by instalments, but with no right to a conveyance until the whole amount has been paid. This case comes under the second heading, but has certain additional features, in that the payments were reserved by way of weekly rental, and the purchaser would be obliged, on the completion of payments, to surrender certain occupier loan stock certificates to which, under the rules of the society, he would have become entitled. In addition, the tenancy could be terminated on any Saturday by giving 7 days' notice. On a consideration of these terms of the agreement, and in particular of the clause giving a right to terminate the agreement and the provision that the tenant's rights as a member of the society should not affect the relationship of landlord and tenant existing between the parties, the court has found **that** the company had been rightly assessed under r. 8 (b). A

AS TO PERSONS CHARGEABLE UNDER SCHEDULE A, see HALSBURY, *Hailsham Edn.*, Vol. 17, p. 52, para. 101; and FOR CASES, see DIGEST, Vol. 28, pp. 14, 15, Nos. 71-74.] B

CASE STATED by the Commissioners for the General Purposes of the Income Tax acting in and for the Division of Leicester Borough under the Income Tax Act, 1918, s. 149, for the opinion of the King's Bench Division of the High Court of Justice. C

The appellant company was formed and registered under the Industrial and Provident Societies Acts, 1893 to 1928, on Feb. 23, 1936, and on May 1, 1939, was converted by special resolution into a company registered under the Companies Act, 1929. The business of the appellant company consisted partly of letting, on a weekly basis, houses which it had purchased. The weekly rental was calculated so as to include a sum which, accumulated at $4\frac{1}{2}$ per cent. per annum compound interest, would be sufficient to recoup the company for the purchase price of the house at the end of 30 years. A person who occupied a house belonging to the company usually did so in accordance with the rules of the company. An occupier-member was required by the rules to hold at least one £1 share in the capital of the company. After 5 years' occupation, assuming he had fulfilled the obligations imposed upon him by the rules, the member became entitled to one occupier loan stock certificate, and to one further certificate at the end of each subsequent period of 2 years. At the expiration of 30 years, the fee simple estate in the property or a long-term leasehold interest subject to a small ground rent was assigned to the member without further payment in consideration of the surrender by him of the requisite number of occupier loan stock certificates. The company let a house property which it had purchased to an occupier, one Sanders, under an agreement dated May 1, 1939, by virtue of which the occupier agreed to take the property on a weekly tenancy from Mar. 6, 1939, and to pay a weekly rental of 14s. 8d. in respect thereof. The occupier became an occupier-member on Mar. 6, 1939. From Dec. 6, 1937, to Mar. 6, 1939, the property had been let by the company to the occupier on an ordinary tenancy agreement. An assessment was made upon the property under the Income Tax Act, 1918, Sched. A, No. VII, r. 8 (b), for the year 1938-39 in the sum of £31 10s. gross and £23 10s. net. The appellant company by letter dated Mar. 25, 1939, D
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objected to the assessment on the grounds (i) that the occupier was the owner-occupier under the rules and, as such, demand for tax should be made upon the occupier, and (ii) that, when the demand was made upon the occupier, the amount should be on the owner-occupier basis. The company had duly paid the tax chargeable in respect of the year 1937-38.

A It was contended on behalf of the company :

- (a) that the assessment relating to the period from Mar. 6, 1939, when the occupier had become a member, to Apr. 5, 1939, should properly be made on the occupier as owner; (b) that at the end of the 30-years period of occupation the occupier was entitled to a conveyance of the property without further payment, and that until that date he enjoyed full powers of ownership; (c) that the company paid, during the period of tenancy, all usual outgoings, and that the weekly payment which was based on repayment of capital was intended to cover the amount which the company had paid for the property, there being no provision made in the agreement for increasing the weekly payment except upon an increase of rates; (d) that the company should not be assessed as it was not in receipt of any profit from the property; (e) that it would be unfair to assess the company, which would have no power to recover the tax from the occupier, since the occupier was in receipt of the benefit of the occupation; (f) that the legal position of the company as to ownership was, in this case, analagous to the position of building sociétés in advancing loans to private purchasers.
- B
- C

It was contended on behalf of the Crown that the company was the owner and/or landlord of the property during the year of assessment 1938-39 within the meaning of the Income Tax Act, 1918, Sched. A, No. VII, r. 8 (b). The commissioners held that the company was the true owner of the property as it had not assigned or conveyed the fee simple estate therein, and that the assessment had been properly made and should be upheld.

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B. L. A. O'Malley (for *Roy E. Borneman* on war service) for the appellants.

E

The Solicitor-General (*Rt. Hon. Sir William Jowitt, K.C.*) and *Reginald P. Hills* for the respondent.

LAWRENCE, J.: The question I have to determine, which is a question of law, and which must be considered by me solely upon legal principles, is whether or not the premises in question were properly assessed upon the appellant company within the meaning of the Income Tax Act, 1918, Sched. A, No. VII, r. 8, which provides as follows :

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The assessment and charge shall be made upon the landlord in respect of . . .
(b) any lands and tenements which are let for a period less than one year . . .

G

It appears that Sanders had occupied the premises in question before he became a member of the appellant company in accordance with its rules, but, before the year of assessment, he became a member of the appellant company under its rules, when he entered into an agreement, dated May 1, 1939, with the appellant company. That agreement provided that Sanders, as tenant, should take the premises from the appellant company at a rent of 14s. 8d. per week, and that he should not be at liberty to assign or let or part with the possession of the premises without the consent in writing of the society. The tenancy, which was a weekly tenancy, could be terminated on any Saturday by

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either party giving the other not less than 7 days' notice in writing, provided that during the existence of the tenancy the society should not give notice under that clause unless the rent payable should be in arrears for 14 days or upwards or the tenant had committed some breach of his obligations other than the payment of rent and had failed to remedy and make good the same within a certain time, or that the society should have given him notice with reference to these matters on more than three occasions. As counsel for the appellants has pointed out to me, there is nothing in the agreement to prevent the tenant from giving notice at any time and determining his tenancy. By cl. 8 of the agreement, it is provided that the relationship of landlord and tenant created by the agreement and the operation of the agreement shall not in any way prejudice or affect the tenant, who shall at all times have such rights in connection with his occupation of the premises for the issue of occupier loan stock certificates and the privileges ancillary thereto as are conferred by the rules of the society in force at the date of the agreement. Under those rules, the occupier, who had to become a member of the society in order to have these privileges, was entitled to certain occupier loan stock certificates, and after a period of 30 years was entitled, as I understand it, to become the freehold owner of the premises. In my opinion, in view of the provisions in cl. 5 as to the right of the tenant to terminate the tenancy, and in view of the provisions in cl. 8, which expressly state that the tenant's rights as a member of the society shall not prejudice or affect in any way the relationship of landlord and tenant created by the agreement, it is quite impossible to say that the premises in question were not let for a period of less than one year within the meaning of the Income Tax Act, 1918, Sched. A, No. VII, r. 8 (b), or that the company was not the landlord of those premises. Therefore, the assessment was properly made within the words of r. 8 (b). In my opinion, the decision of the commissioners was clearly correct, and, therefore, the appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors: *Bower, Cotton & Bower* (for the appellants); *Solicitor of Inland Revenue* (for the respondent).

[*Reported by D. K. BELCHER, Barrister-at-Law.*]

SOUTHERN v. BORAX CONSOLIDATED, LTD.

[KING'S BENCH DIVISION (Lawrence, J.), **October 10, 11, 14, 15, 16, 1940.**]

Income Tax—Deduction against profits—Expenditure incurred in litigation concerning validity of title to property—Expense of maintaining company's property.

The respondent company purchased certain property for the purposes of its business. Subsequently an action was commenced against the company claiming that its title to the property was invalid. The company defended the action and thereby incurred legal expenses

amounting to £6,249, which sum it claimed to be entitled to deduct as business expenses in computing its profits for the purposes of assessment to income tax. The Revenue contended that the action was concerned with the capital assets of the company and was contested in order to preserve the existence of those assets, and that, therefore, the sum of £6,249 was a capital expense:—

- A HELD: the expense had been incurred, not in creating any new asset, but in maintaining the title to the company's property, and was, therefore, an expense wholly and exclusively incurred for the purposes of the company's trade, and, as such, was properly deductible.

- B [EDITORIAL NOTE. The decision in this case is as important to the legal profession generally as to the company concerned. Litigation is often a business necessity, and it is important that the cost, which must be considerable, can be set off against the profits of the company for the purposes of taxation.

AS TO TRADE EXPENSES, see HALSBURY, Hailsham Edn., Vol. 17, pp. 149-156, paras. 309-320; and FOR CASES, see DIGEST, Vol. 28, pp. 42-45, 50, 51, Nos. 215-226, 255-260.]

- C Cases referred to:

(1) *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (1931), 145 L.T. 169; Digest Supp.; 15 Tax Cas. 761.

(2) *Van den Berghs, Ltd. v. Clark*, [1935] A.C. 431; Digest Supp.; 104 L.J.K.B. 345; 153 L.T. 171; 19 Tax Cas. 390.

- D (3) *Usher's Wiltshire Brewery, Ltd. v. Bruce*, [1915] A.C. 433; 28 Digest 56, 287; 84 L.J.K.B. 417; 112 L.T. 651; 6 Tax Cas. 399; *revsg.*, [1914] 2 K.B. 891.

(4) *Granite Supply Assn., Ltd. v. Kitton (Surveyor of Taxes)* (1905), 5 Tax Cas. 168; 28 Digest 44, case h.

(5) *Dow v. Merchiston Castle School, Ltd.*, [1921] S.C. 853; Digest Supp.; 8 Tax Cas. 149.

- E (6) *Addie (Robert) & Sons' Collieries, Ltd. v. Inland Revenue Comrs.*, [1924] S.C. 231; Digest Supp.; 8 Tax Cas. 671.

(7) *MacTaggart (Inspector of Taxes) v. Strump*, [1925] S.C. 599; 29 Digest 47, case 244i.

(8) *British Insulated & Helsby Cables v. Atherton*, [1926] A.C. 205; 28 Digest 52, 264; 95 L.J.K.B. 336; 134 L.T. 289; 10 Tax Cas. 155; *affg.*, [1925] 1 K.B. 421.

- F (9) *Mallett v. Staveley Coal & Iron Co., Ltd.*, [1928] 2 K.B. 405; Digest Supp.; 97 L.J.K.B. 475; 139 L.T. 241; 13 Tax Cas. 772.

(10) *Mitchell v. Noble (B. W.), Ltd.*, [1927] 1 K.B. 719; Digest Supp.; 96 L.J.K.B. 484; 137 L.T. 33; 11 Tax Cas. 372.

- G (11) *Rhodesia Railways, Ltd. v. Bechuanaland Income Tax Collector*, [1933] A.C. 368; Digest Supp.; 102 L.J.P.C. 72; 149 L.T. 3.

(12) *Strong & Co., Ltd. v. Woodifield*, [1906] A.C. 448; 28 Digest 57, 290; 75 L.J.K.B. 864; 95 L.T. 241; 5 Tax Cas. 215.

(13) *Inland Revenue Comrs. v. Wilson*, [1928] S.C. (H.L.) 42; Digest Supp.; 13 Tax Cas. 789.

- H CASE STATED by the Commissioners for the General Purposes of the Income Tax Acts for the city of London pursuant to the provisions of the Income Tax Act, 1918, s. 149, for the opinion of the High Court of Justice. The respondent company, Borax Consolidated, Ltd., whose business was the mining, manufacture and sale of borax and other mineral products, was the holder of the whole of the capital of a Nevada corporation known as the Pacific Coast Borax Co. (hereinafter

called the Pacific company). It was agreed between the Revenue and the respondent company that the business of the Pacific company should be treated as a branch of the company's business, and, accordingly, for the purpose of assessment to income tax, the profits of the Pacific company fell to be included in computing the profits of the respondent company. In 1923, the respondent company for the purposes of its business acquired land in Mormon Island, California, near Los Angeles, of which the Pacific company was put in possession and upon which it erected wharves and buildings. The Pacific company's business consisted in the mining, preparation and shipment of borax. In 1929, in order to put itself in a position to obtain wharfage dues and rent from the respondent company or the Pacific company, the city of Los Angeles commenced an action against the respondent company and the Pacific company in the Federal District Court of Los Angeles, claiming that the respondent company's title to the land and buildings was invalid, and that such land and buildings were in fact the property of the city. The action was defended by both companies. After 6 years of litigation, a new trial was ordered, and the costs incurred by the Pacific company up to that time amounted to £6,249. It was contended on behalf of the respondent company that this expenditure was incurred by the Pacific company wholly and exclusively for the purpose of its trade, and that, in computing the profits of the respondent company on the basis that the trade of the Pacific company was a branch of the trade of the respondent company, such expenditure was deductible as a business expense in computing the profits of the respondent company for the purposes of assessment. It was contended by the Revenue that the action concerned the capital assets of the respondent company and was contested to preserve the existence of those assets, and that the costs were capital expenditure. The following cases were referred to: *Strong & Co., Ltd. v. Woodifield* (12), *Van den Berghs, Ltd. v. Clark* (2), *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (1), *MacTaggart (Inspector of Taxes) v. Strump* (7), *Inland Revenue Comrs. v. Wilson* (13) and *Mallett v. Staveley Coal & Iron Co., Ltd.* (9). The commissioners found on the evidence that the sum of £6,249 was wholly and exclusively laid out by the Pacific company for the purposes of its trade, and was an allowable deduction in computing the profits of the respondent company for income tax purposes.

The Solicitor-General (Rt. Hon Sir William Jowitt, K.C.) and Reginald P. Hills for the appellant.

J. Millard Tucker, K.C., and J. S. Scrimgeour for the respondents.

LAWRENCE, J.: The real property in question in this case was an island known as Mormon Island in California, near Los Angeles, in the United States of America. Para. 4 of the special case states as follows:

On the facts of the relevant years it has been agreed between the Inland Revenue and the company that the business of the Pacific company should be treated as a

branch of the company's business and accordingly for the purposes of assessment to income tax the profits of the Pacific company fall to be included in computing the profits of the company.

Para. 5 states as follows :

In 1923 the company for the purposes of its business acquired land in Mormon Island in California near Los Angeles of which the Pacific company was put into possession and upon which the Pacific company erected wharves and buildings.

Paras. 7 and 8 state as follows :

7. In 1929 the city of Los Angeles in order to put itself into a position to obtain wharfage dues and rents from the company or from the Pacific company commenced an action in the Federal District Court of Los Angeles against the company and the Pacific company claiming that the company's title to the land and buildings occupied was invalid, and that such land and buildings were in fact the property of the city. This action was defended by the company and by the Pacific company. 8. After 6 years of litigation a new trial was ordered and the costs incurred by the Pacific company up to that time amounted to £6,249.

It was that sum which the respondent company sought to deduct for the purposes of income tax, and which the general commissioners have held is a proper deduction. The general commissioners have found expressly on the evidence :

. . . that the said sum of £6,249 was wholly and exclusively laid out by the Pacific company for the purposes of its trade and was an allowable deduction in computing the profits of the company for income tax purposes.

The argument on behalf of the Crown is that this sum of money was not wholly and exclusively laid out for the purposes of the company's trade, but was laid out in the interests of the company as owner of the property, and reliance is principally placed upon *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (1). In the second place, it is argued for the Crown that in any event the sum of money paid in defending this action was properly attributable to capital, and not to revenue.

In opening the appeal, the Solicitor-General put five tests by which, he said, it could be decided whether or not a deduction was a proper deduction under the Income Tax Acts. First, he asked whether or not the deduction relates to the main framework of the taxpayer's business.

If it does, it is not deductible. In support of that proposition he cited *Van den Berghs, Ltd. v. Clark* (2). In the second place, he asked if the deduction made by the company was made in its capacity of trader or in its capacity of property owner. The principal support for that proposition was *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (1). The third test was whether or not the payment was recurrent, the fourth test was whether it was in connection with, or out of, fixed or circulating capital, and the fifth test was whether it resulted in bringing into existence an asset for the enduring benefit of the trade.

I will deal with the great number of cases cited on behalf of the Crown when I come to deal with the question whether or not it is money wholly and exclusively laid out for the purposes of the company's trade. On that, there is the express finding of the commissioners that it was, and it seems to me that the question which I have to decide is whether I ought to hold that the result of *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (1) is that it is impossible for the commissioners to

come to the conclusion, as a finding of fact, that such an expenditure as this was wholly and exclusively laid out for the purposes of the company's trade. In my opinion, *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (1) cannot be cited as an authority for that proposition. It was a case in which the House of Lords was dealing with land in Scotland in respect of which the owner of the land, who was also the occupier, had to pay owner's rates, and, in accordance with the terms of the Income Tax Acts, an allowance for such owner's rates might be made under Sched. A. The company had claimed and obtained such an allowance under Sched. A, and then attempted to deduct again the amount of the owner's rates as a payment wholly and exclusively laid out for the purposes of the company's business under Sched. D, but the House of Lords decided by a majority that they could not. It is perfectly true that, in my opinion, at any rate, the majority, composed of LORD WARRINGTON OF CLYFFE, LORD THANKERTON and LORD MACMILLAN, do base that decision upon the ground that the payment of the owner's rates was a payment made *qua* owner and not *qua* trader, and it was not, therefore, wholly and exclusively laid out for the purposes of the company's trade, but the House of Lords was dealing with land, and that tax was an imposition upon land which was specifically dealt with by the terms of the Income Tax Acts under Sched. A, and it appears to me that that decision is not decisive at all with reference to land situated abroad and not liable to income tax under Sched. A, and that that decision cannot be cited as an authority which prevents a tribunal of fact from coming to the conclusion upon the facts that certain sums of money were wholly and exclusively laid out for the purposes of the trade although they relate to real property. It seems to me that in certain circumstances ownership of land may be as necessary for the purposes of trade as the acquisition of a less interest in the land. It may be that the land desired can only be bought. In this case, as far as the facts appear, it seems probable that it was necessary for the company to build their own permanent structures and wharves on the land in question, and I am of opinion, therefore, that there was evidence upon which the commissioners could properly find that this sum of money was wholly and exclusively laid out for the purposes of the company's trade.

Counsel for the respondents referred to *Usher's Wiltshire Brewery, Ltd. v. Bruce* (3). In that case, it was held that repairs to buildings, fire insurance premiums, rates and taxes and legal costs were all proper deductions for the purposes of income tax in England although the land was in England. It seems to me that those expenses had the effect of preserving the landlord's interests just as much as defending an action against his title.

On the question as to whether this is a payment properly attributable to capital or to revenue, in my opinion, the principle which is to be deduced from the cases is that, where a sum of money is laid out for

the acquisition or the improvement of a fixed capital asset, it is attributable to capital, but that, if no alteration in the fixed capital asset is made by the payment, then it is properly attributable to revenue, being in substance a matter of maintenance, the maintenance of the capital structure or the capital assets of the company. As I suggested to counsel A for the Crown, the only way in which it can be said that there was here any alteration in the capital assets of the respondent company was that the city of Los Angeles had been removed from the category of possible litigants who might challenge the company's title. I cannot think that that makes the payment a capital payment. The title of the company, B which must be assumed, in my opinion, to have been a good title, remains the same. There is nothing added to the title or taken away, and the title has simply been maintained by this payment. All the cases cited by the Crown appear to me to be consistent with the principle which I have stated.

C The first case cited was *Granite Supply Assocn., Ltd. v. Kitton* (4), where what was held to be a capital payment was a payment for carting materials from an old yard to a new one, and there it seems to me that it was looked upon as being a part of the cost of acquisition of the new yard. In *Dow v. Merchiston Castle School, Ltd.* (5), the matter concerned D what is called in Scottish law a duplicand of feu-duty which fell to be paid by the terms of the original feu charter for 21 years. It was held that that was not a proper deduction, and it is perfectly true that the judgment was based principally upon the view that it was an imposition, or that at least it was a payment made by the owner *qua* owner, and that, E therefore, it was not a proper deduction. That again, however, was a case like *Inland Revenue Comrs. v. Scottish Central Electric Power Co.* (1), where the land in question was taxable under Sched. A. Apart from that, in my opinion, the decision in that case is otherwise perfectly consistent with the principle which I have stated, since the duplicand F of feu-duty was payable by the terms of the original charter and could properly be looked at—I cannot say it was properly looked at—as part of the original cost of the capital asset.

In *Addie (Robert) & Sons' Collieries, Ltd. v. Inland Revenue Comrs.* (6), the case was one of a mineral lease, which was admittedly a fixed capital G asset, and by the terms of the mineral lease the lessee had an option either to restore the surface or to pay a sum of money, and he chose the latter course. It appears to me that there again it was part of the price of the acquisition of the capital asset. He got the lease on the terms of either restoring the surface or paying, and he paid. Therefore, it H was capital. In *MacTaggart (Inspector of Taxes) v. Strump* (7), the case was one of a premium paid to secure renewal of a lease. There again there was a new capital asset secured. In *British Insulated & Helsby Cables v. Atherton* (8), VISCOUNT CAVE, L.C., laid down this general test, at pp. 213, 214 :

... when an expenditure is made, not only once and for all, but with a view to

bringing into existence an asset or an advantage for the enduring benefit of a trade, I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such an expenditure as properly attributable not to revenue but to capital.

Thus, if it could be said here that this expenditure had in any way altered the original character of the capital asset which was acquired by the respondent company, I should have taken the view that the payment was in respect of capital, but, as, in my opinion, the capital asset of the respondent company remained absolutely unaltered, that payment is properly attributable to revenue. A

In *Mallett v. Staveley Coal & Iron Co., Ltd.* (9), the case was one of a payment made by a mineral lessee for the privilege of being allowed to surrender seams of coal. That again, in my opinion, was a loss on the realisation of the capital asset. B

Then, in *Van den Berghs, Ltd. v. Clark* (2), the question was as to a sum of money paid upon the cancellation of a contract which, the House of Lords held, related to the whole structure of the company. The view taken was that the whole structure of the company was the totality of its capital assets, and that the payment made for an alteration of those capital assets was a capital payment. C

On behalf of the respondent company, reference was made to *Mitchell v. Noble (B. W.), Ltd.* (10), and attention was drawn to the words of LORD HANWORTH, M.R., at p. 737: D

It was a payment made in the course of business, with reference to a particular difficulty which arose in the course of the year, and was made not in order to secure an actual asset to the company but to enable the company to continue to carry on, as it had done in the past, the same type and high quality of business, unfettered and unimpaired by the presence of one who, if the public had known about his position, might have caused difficulty in its business and whom it was necessary to deal and settle with at once. E

It was a case in which a very large payment was made to get rid of a director, and it was held to be an income payment. What counsel for the respondent suggested was that it was looked upon by the court as being a payment which was made, not for the purpose of acquiring or realising an asset, but simply for the purpose of preserving the asset of the company's goodwill. SARGANT, L.J., said, at p. 738: F

The object, as disclosed by para. 9 of the case, was that of preserving the status and reputation of the company, which the directors felt would be imperilled by the other director remaining in the business or by a dismissal of him against his will, involving proceedings by way of action in which the good name of the company might suffer. To avoid that and to preserve the status and dividend earning power of the company seems to me a purpose which is well within the ordinary purposes of the trade, profession or vocation of the company. G

The other case relied upon by counsel for the respondents was *Rhodesia Railways, Ltd. v. Bechuanaland Income Tax Collector* (11), where a very large expenditure had been made by the railway company for the renewal of the rails—a renewal which was not made annually, but was made, of course, in the ordinary business of the railway company after a certain period—and it was held there that the sum expended was not of a capital nature, but was expended for repairs of property H

occupied for the purposes of trade or in respect of which the trade was carried on. In expressing the view of the Judicial Committee, LORD MACMILLAN said, at p. 374 :

A It did not result in the creation of any new asset ; it was incurred to maintain the appellants' existing line in a state to earn revenue. The analogy of a wasting asset which appears to have affected the minds of the Special Court has really no application to such a case as the present.

B It appears to me that the legal expenses which were incurred by the respondent company did not create any new asset at all, but were expenses which were incurred in the ordinary course of maintaining the assets of the company, and the fact that it was maintaining the title, and not the value, of the company's business does not make it any different. There is nothing in the cases which deal with payments made by an owner in respect of property which he owns in England and which is liable to taxation under Sched. A which renders it impossible for the tribunal of fact to find that expenditure in connection with land abroad not subject to income tax under Sched. A was wholly and exclusively laid out for the purposes of the company's trade. Therefore, I am of the opinion that the decision of the commissioners was right, and the appeal will be dismissed with costs.

D *Appeal dismissed with costs.*

Solicitors : *Solicitor of Inland Revenue* (for the appellant) ; *Ashurst, Morris, Crisp & Co.* (for the respondents).

[*Reported by D. K. BELCHER, Barrister-at-Law.*]

E INLAND REVENUE COMMISSIONERS v. PAYTON.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.J.J.), **November 18, 19, 29, 1940.**]

F *Income Tax—Sur-tax—Income for purposes of sur-tax—Deed assigning part of income to trustees—Income of company deemed to be income of taxpayer—Whether such income subject to deed.*

G By a deed dated Mar. 22, 1935, the appellant covenanted with the trustee that he would in every year pay to the trustee an annual sum (subject to deduction of income tax) equal to one-fourth part of his income as defined in the deed. By cl. 9 of the deed, "year" was defined as a year beginning on Apr. 6 and ending on Apr. 5 following, and "income" was defined as the income of the settlor as computed for the purpose of the Income Tax Acts, but excluding therefrom certain specified income, and after deducting therefrom all such annual sums, annuities or interest (excluding the amount payable under the deed) as are allowed as deductions in computing total income for the purpose of the Income Tax Acts. The operative part of the deed provided that the sums paid under it should be accumulated by the trustee and that the accumulated fund should be subject to a general testamentary power of appointment in the appellant, with a trust in default of appointment to his statutory next of kin. A power of revocation with the consent of the trustee was reserved to the appellant. In July, 1937, in consequence of a direction given under the Finance Act, 1922, s. 21, certain income of a company was deemed to be the income of the

members, of which the appellant was one. The appellant paid to the trustee one-fourth of the sum apportioned to him. The appellant then claimed that, on the true construction of the deed, he was bound to make that payment, and, therefore, that a consequential reduction in his assessment to sur-tax for the year 1935-36 ought to be made:—

HELD: on the true construction of the deed, the appellant was bound to pay one-fourth of the sum in question to the trustee, and, therefore, was not liable to pay sur-tax upon it. A

[EDITORIAL NOTE.] In dealing with a complicated subject it is often desirable to start from first principles, and in the present case **SIR WILFRID GREENE, M.R.**, has commenced his judgment with certain introductory remarks which he describes as elementary but a necessary introduction to the consideration of the problem here to be considered. It has to be remembered that the so-called “apportioned income of the company” would be undistributed profits. The appellant would not receive any part of that income for the simple reason that it was undistributed. The question to be decided is, therefore, whether this sum which is deemed to be his income is his income within the meaning of that word as used in the deed. If it is, then he is bound by the deed to pay one quarter of that sum to the trustee, and the amount of that quarter is to be deducted from his total income for sur-tax purposes. This point is decided in the taxpayer’s favour. **SIR WILFRID GREENE, M.R.**, doubts whether the primary object of the deed, *i.e.*, to reduce the covenantor’s liability to sur-tax, can be taken into consideration in construing the deed, but the other members of the court seem to derive some help from the obvious intention of the covenantor. B

AS TO DEDUCTIONS IN COMPUTING TOTAL INCOME, see **HALSBURY**, Hailsham Edn., Vol. 17, pp. 275-278, paras. 546-548; and **FOR CASES**, see **DIGEST**, Vol. 28, pp. 111, 112, Nos. 683-689.] C

APPEAL by the taxpayer from a judgment of **LAWRENCE, J.**, dated June 14, 1940. The facts are fully set out in the judgment of **SIR WILFRID GREENE, M.R.** D

Cyril L. King, K.C., and *Frederick G. Grant* for the appellant. E

The Solicitor-General (Rt. Hon. Sir William Jowitt, K.C.), *J. H. Stamp* and *Reginald P. Hills* for the respondents.

SIR WILFRID GREENE, M.R.: By a deed dated Mar. 22, 1935, the appellant covenanted with a trustee that he would in every year pay to the trustee an annual sum (subject to deduction of income tax) equal to a one-fourth part of his income as defined in cl. 2 thereof. By cl. 2 the expression “year” was defined as meaning a year beginning on Apr. 6 and ending on Apr. 5 following. The expression “income” was defined as follows: F

The expression “income” means the income of the settlor as computed for the purpose of the Income Tax Acts but excluding therefrom such income as may accrue to him as a member of an underwriting syndicate at Lloyds and after deducting therefrom all annual sums, annuities or interest (excluding the sum payable under this deed) as are allowed as deductions in computing total income for the purpose of the said Acts. G

The operative clauses of the deed provided that the sums paid under it should be accumulated by the trustee and that the accumulated trust fund should be subject to a general testamentary power of appointment in the appellant, with a trust in default of appointment for the appellant’s H

next of kin. A power of revocation with the consent of the trustee was reserved to the appellant.

- Having regard to the date when this deed was executed, it was admittedly effective to entitle the appellant to deduct any sums paid under it in computing his total income for the purposes of the Income Tax Acts. The question raised by this appeal is whether or not, upon its true construction, a certain sum is payable by the appellant under the deed. It is to be borne in mind that this question must be approached as being what in truth it is—namely, a question as between covenantor and covenantee. The consequential effect of its decision upon the appellant's liability to tax is a purely collateral matter, which cannot, I think, affect the construction of the deed. We were invited by counsel for the appellant to regard the deed as one the primary object of which was to enable the appellant lawfully to reduce his liability to sur-tax, and to construe it with that consideration in view. This argument I am unable to accept. No one familiar with documents of this kind can fail to have a suspicion amounting almost to conviction that the object of the deed was as stated, but I doubt whether this can be allowed to affect its construction, and in coming to my conclusion I have not been influenced by any consideration as to the probable object of the deed. The fact that the ultimate destination of the trust fund is the appellant's own estate has led to the curious result that he is arguing in favour of an increase of his liability under the deed, his object being, of course, to secure the greatest possible diminution of his sur-tax liability. Had his covenant enured for the benefit of third parties, he might well have argued in the opposite sense.

- The appellant was the holder of shares in a company known as Birmingham Criterions, Ltd. Under the provisions of the Income Tax Acts relating to what is commonly called company sur-tax, an assessment to sur-tax was made upon the appellant in the name of the company for the year 1935-36 in a sum eventually fixed at £45,484. After some litigation, this assessment was confirmed by the court. Thereafter, the appellant paid to the trustee of the deed the sum of £11,371, being one-quarter of the sum of £45,484, less income tax at the standard rate. He asserts that, upon the true construction of the deed, he was liable to make this payment, and claims that a consequential reduction of his sur-tax assessment for the year 1935-36 ought to be made. It is now conceded that, if the construction for which the appellant contends is correct, he will be entitled to the reduction claimed. The commissioners for the special purposes of the Income Tax Acts accepted the view put forward on behalf of the appellant. On a case stated, LAWRENCE, J., reversed that decision, and this appeal results.

Before any intelligible meaning can be given to the language of the deed, it is necessary to examine certain provisions of the Income Tax Acts. It is a commonplace to say that those Acts impose a tax on income. The basic charge imposed by the Acts is a charge on what

may accurately be described as income of the individual taxpayer. The method of computing the income of the taxpayer for the purpose of tax in regard to a given year is, of course, artificial, and leads to a result which in many, and perhaps in most, cases does not represent the actual income received by the taxpayer in the year of assessment. However, this does not alter the fact that the basic charge is a charge upon his income. There was from the first one qualification of this—namely, the assessment of tax under Sched. A, which, in a case where the taxpayer is himself the occupier of the land, has no reference to any income actually received by him. Nevertheless, he was throughout treated as being in the beneficial enjoyment of the income which he could have derived from his ownership of the land had he been minded to do so.

To this basic conception of income tax certain qualifications have been made, the effect of which has been to treat for certain purposes as income of the taxpayer income which belongs in law, not to him, but to someone else. Examples of this are to be found in the case of husband and wife, and in the provisions of the Finance Act, 1922, s. 20 (which relates to income under revocable and certain other dispositions), of the Finance Act, 1936, s. 21 (which relates to income settled on children), and of the Finance Act, 1938, s. 38 (which relates to income arising under certain kinds of settlement), and, of course, in the case of company sur-tax, which gives rise to the present question.

In the case of income tax, as distinct from sur-tax, the charge is made effective in two ways—namely, (i) direct assessment and (ii) deduction at source. For the purposes of assessment, no return is called for from the taxpayer except in the case of direct assessment. Nevertheless, payments from which the tax is deducted are his income, and the tax paid is in reality his tax. For certain purposes, however, the taxpayer must make a return of his total income. Those purposes are (i) claims to relief, and (ii) sur-tax. I need not set out in detail the provisions of the Acts which deal with these matters. They can be extracted from the Income Tax Act, 1918, ss. 27, 207, No. XVII in Sched. V to that Act (as amended by the Finance Act, 1927, s. 46, Sched. V, Part III), and the Finance Act, 1927, s. 38. Speaking generally, the same computation or “estimation” of total income is required for both purposes, but there is an exception of some importance for the present discussion in the case of company sur-tax, to which reference will presently be made. Leaving this exception aside for the moment, the computation of total income is made by adding (i) income which is the subject of direct assessment, and (ii) income from which tax is deducted at source, and deducting from the resulting sum the amount of payments made by the taxpayer from which he is entitled to deduct tax, the amount of those payments, as I have already said, being treated for tax purposes as income of the recipient, and not as income of the payer.

The foregoing remarks are no doubt elementary, but they form a

necessary introduction to the consideration of the present problem. I will now turn to the relevant matters connected with company sur-tax and its relation to the "total income" of the shareholder concerned. Under the Finance Act, 1922, s. 21 (1), as amended, the machinery is set in motion by a direction of the special commissioners that the income of the company which is in question shall, for the purposes of assessment to sur-tax, be deemed to be the income of the members and that it shall be apportioned among the members. Sur-tax is then to be assessed and charged in respect of each member, assessment being made on the member in the name of the company. Notice of charge to sur-tax is then served on the member, who may elect to pay. If he does not do so, the tax is payable by the company (subsect. (2)). If the company does not pay, the tax is recoverable from the member (Finance Act, 1936, s. 19 (5)).

- The income dealt with by these provisions is, of course, the income of the company, and it will continue to belong to the company until a distribution is made among the members, but, for the purposes of assessment to sur-tax, it is deemed to be the income of the members, and, accordingly, must be taken into account in computing their total income for sur-tax purposes. On the other hand, it would appear that it does not enter into the computation of total income for the purpose of a claim to relief. Indeed, it would make no difference if it did, except in the very unlikely case of the member having no income, or only a small income from other sources. It appears clear, therefore, that, for one "purpose of the Income Tax Acts," to quote the definition clause in the deed—namely, sur-tax—the apportioned income in question, although it is not in truth his income, must be taken into account in the computation of the income of the appellant for the year specified. It is true that the computation of income for the purpose of sur-tax is a computation of "total income," but it is nevertheless a computation of income, and, if the matter had stood there, it could not have been doubted that the deduction claimed was admissible. However, the argument for the Crown is based on the latter part of the definition which deals with deductions. It is said, and LAWRENCE, J., agreed, that this provision would have been unnecessary if in the earlier part of the definition "income" had meant "total income," since the deductions mentioned are permissible in any event in a computation of total income. It is also pointed out that this latter part of the definition refers to "total income," whereas the earlier part refers to "income," and it is said that this variation in language shows that the computation of income cannot be a computation of total income. This argument appears attractive at first sight, but it at once suggests the question: "If 'income' does not mean 'total income,' to what income does it refer?" It is said that it means, and means only, income of the appellant which is taxed (i) by direct assessment, and (ii) by deduction at source, but this answer is one which I am unable to accept, since no

computation of a taxpayer's income made either by the Inland Revenue authorities or by the taxpayer includes income taxed at source, except for the purposes of sur-tax and claims to relief, and a computation made for either of those purposes is a computation of "total income," which is *ex hypothesi* excluded. In view of this difficulty, it is pointed out by the appellant—I think correctly—that, if "income" does not mean "total income," it must be limited to income which is subject to direct assessment, since that is the only "income" in respect of which a computation falls to be made. It is not possible, in my view, to place so limited a construction on the word, and I am accordingly driven to the conclusion that the computation referred to is the computation of total income for purposes of sur-tax. It is true that, in the computation of total income for the purposes of a claim to relief, the sum in question is not included, and, therefore, for one purpose of the Income Tax Acts, it does not enter into the computation, but, if a choice has to be made between a computation of total income for the purposes of sur-tax and a computation of total income for the purpose of a claim to relief, it is on the former, and not on the latter, that the choice, in my opinion, should fall, since the governing purpose of the Income Tax Acts is to impose taxation, and not to grant relief. If the view which I have expressed is correct, the reference to deductions is to be explained by the fact that it was desired to exclude the deduction of the amount payable under the deed, and it was thought convenient to provide for this by stating in terms that all deductions except that particular one were to be made.

Before concluding, I must refer to the Finance Act, 1922, s. 21 (4). That subsection provides that undistributed income which has been charged under the section is not, when subsequently distributed, to be deemed to form part of the total income for the purposes of sur-tax of any individual entitled thereto. This raises the question of what the liability of the appellant under the deed would have been if the company had continued as a going concern and had distributed the profits in question. Such a distribution could only have been made by way of dividend, which would have been taxed at source. In the year of receipt, such a dividend would not have entered into any computation of income of the appellant save a computation of total income for the one purpose of a claim to relief, but this, in my opinion, would not have brought the sum received within the scope of the deed, since a computation for the mere purpose of claiming relief would not, I think, be a computation for "the" purpose of the Income Tax Acts. I refer to this matter (which does not, of course, fall for decision) because an interpretation which brought within the scope of the deed both the amount assessed to sur-tax and the amount ultimately distributed by the company would not commend itself to me. The deed is loosely drawn, and neither of the interpretations proposed is free from difficulty, but, for the reasons stated, I prefer the view which I have expressed to

that taken by LAWRENCE, J. The appeal will be allowed, with costs here and below.

- CLAUSON, L.J. : This is an appeal from an order of LAWRENCE, J., dated June 14, 1940, whereby he reversed a determination of the special
- A commissioners, under which Payton had been granted relief to the extent of sur-tax on a sum of £11,371. Payton had paid sur-tax on a sum based upon a return rendered by him on June 25, 1936, which at the time was a correct return. However, by reason of certain subsequent events, the true position, as Payton contended, was that the return
- B and the consequent assessment for the year 1935-36 required correction. It was contended at one time on behalf of the Crown that the error, if error there were, could not be corrected. That contention, however, was negatived by the special commissioners, and has now passed from the case, and it is no longer necessary to deal with it.
- C The subsequent events which, so Payton contended, justified a claim for a correction of the return and a modification of the assessment were these. On July 29, 1937, certain directions given under the Finance Act, 1922, s. 21, in respect of Birmingham Criterions, Ltd., became binding, with the admitted result that a portion of the actual
- D income of that company had to be deemed to be the income of the members of that company, of whom Payton was one, and £45,484, part of that portion, was apportioned to Payton, with the consequence that (to apply the language of sect. 21) sur-tax had to be assessed in respect of that sum for the year 1935-36 upon Payton in the name of the company,
- E and became payable by the company, subject to the right of Payton to pay it himself if he thought fit. By virtue of the Finance Act, 1922, Sched. I, r. 8, as amended by the Finance Act, 1927, this sum of £45,484 is (to apply the language of the rule) to be deemed for the purposes of sur-tax to represent the income from Payton's interest in Birmingham
- F Criterions, Ltd., and is to be included in the statement of his total income. So far, there is no difficulty or dispute. Admittedly, the effect of that which I have stated was to add £45,484 to Payton's income as computed for sur-tax purposes.

- The further matter which is the immediate cause of dispute arises
- G from the fact that on Mar. 22, 1935, Payton had executed a document by which he bound himself to pay away part of his income. It was not disputed that, in regard to sur-tax for the period relevant to this case—namely, the year 1935-36—the deed must be considered effective, and that Payton is entitled to relief from sur-tax in respect of that period in
- H regard to the sum, whatever it may be, which he is liable to pay under that deed. The dispute arises on the question of what it is that under that document Payton bound himself to pay away.

The material clauses in the document of Mar. 22, 1935, are these :

1. The settlor hereby covenants with the trustee that during his life he will in every year pay to the trustee an annual sum (subject to deduction of income tax

at the standard rate for the time being in force) equal to a one-fourth part of his income as defined in cl. 2 hereof. 2. The expression "income" means the income of the settlor as computed for the purpose of the Income Tax Acts but excluding therefrom such income as may accrue to him as a member of an underwriting syndicate at Lloyds and after deducting therefrom all annual sums annuities or interest (excluding the sum payable under this deed) as are allowed as deductions in computing total income for the purpose of the said Acts.

It is not necessary to set out any of the other provisions of the deed, A
but it may be observed that the deed is revocable at any moment by
Payton with the consent of the trustee. There is also power to Payton
to require the trustee to transfer the trust fund to Payton, or as he
may direct. Whether or not this requirement can be made only with
the trustee's consent I do not pause to inquire. The trust is to accumu- B
late the fund, and the sole beneficiaries, apart from Payton, are the persons
who take the residuary trust fund under his will, or, if he dies intestate,
those who take his estate on the intestacy. It is quite obvious that the
sole purpose of the deed is to diminish the income immediately receiv- C
able by Payton, and that, as his only interest in diminishing his income
immediately receivable must be to diminish his liability to taxation,
his interest must necessarily be, not, as the interest of any ordinary
covenantor would be, to put forward arguments to narrow the operation
of the deed, but to put forward arguments to widen its operation, and
accordingly Payton attempts to construe the terms of the covenant D
as widely as he can.

Payton's contention upon the terms of the deed (and, as I have
observed, the only dispute is on the true construction of those terms)
may be put in the simplest form. He says that the true purpose and
obvious meaning of the deed are to diminish by one-fourth by force E
of the covenant the sum which, for purposes of taxation, is to be
treated as his income, and its operation accordingly is to diminish by
one-fourth—namely, by £11,371—the £45,484 which, by virtue of the
notional apportionment to him of that sum out of the actual income
of Birmingham Criteria, Ltd., has been added notionally to that F
which, for purposes of taxation, is to be treated as his income. This
contention was accepted as correct by the special commissioners, who
could see no answer to it. I find myself in the same position. I can
see no answer to it. The terms of the document appear to me to lead
quite plainly and clearly to the conclusion for which Payton contends. G
LAWRENCE, J., however, after carefully considering the arguments of
counsel for the Crown, which, in their ultimate analysis, appeared to me
to resolve themselves into the ground on which LAWRENCE, J., decided,
rejected this contention, on grounds which may be stated thus. First, H
LAWRENCE, J., took the view that the £45,484 was not Payton's income.
That no doubt is the case, but there is no question that, under the
statute, that sum is to be deemed to be his income for the purpose,
at all events, of assessing sur-tax. I feel myself quite unable to accept
the view that income which is deemed by statute to be a man's income
for the purpose of assessing sur-tax does not form part of the income of

the settlor as computed for the purpose of the Income Tax Acts. It is to be deemed to be his income for the purpose of some taxation—namely, the imposition of sur-tax—though not, it may be, for the imposition of the standard rate of tax. It appears to me to be correctly described as part of his income as computed for the purpose of the

A Acts, even though it may not be amenable to the whole of the taxation which, in varying circumstances, the Acts impose on various ingredients in his income. I am satisfied that a substantial part of the intention of the deed, as gathered from its terms as a whole, would be nullified if a narrower interpretation of the words were adopted, even if such

B narrower interpretation were possible as a matter of language.

Secondly, it was argued before LAWRENCE, J., who was apparently attracted by the argument, though he does not, perhaps, base his decision upon it, that the reference in cl. 2 of the deed to certain items which are to be deducted from the “income of the settlor as computed for the

C purpose of the Income Tax Acts,” and which are described as items “to be allowed as deductions in computing total income for the purposes of the said Acts,” indicates that the income in question is something other than the total income which is the basis of the sur-tax assessment. I cannot myself attach any weight to the argument. In my view,

D the words are directed solely to emphasising that, in computing the income in question, no regard is to be had to the diminution of it by the operation of the deed, but it is to be computed by deducting the items which the Acts regard as proper items of deduction to be made in reaching what may be called the figure of real income. I cannot

E accept the view that the words indicate that the income a fourth of which is to be paid over must be reached by some process other than the ordinary processes by which the income on which sur-tax is to be calculated is to be ascertained.

Counsel on each side drew our attention in detail to many well-known

F difficulties in the way of finding a completely logical context for the word “income” in the various contexts in which that word appears in the Acts. I trust that I shall not be accused of any disrespect to their interesting and careful arguments if I venture to observe that our task is to construe the deed, and, fortunately, not to reconcile the various

G uses of the term “income” in the Acts.

I should mention one further point which emerged in argument. It was pointed out that the construction of the deed which was accepted—and, in my judgment, rightly accepted—by the commissioners may place on the covenantor an obligation to pay to the trustee a sum

H measured as a part of a sum which he may not, and probably will not, at all events at the time his obligation operates, have actually received. Such a consideration no doubt might have some weight in an ordinary case on the construction of doubtful words in a deed, but I cannot myself attribute any weight to it in the case of such a deed as the present, the function of which is obviously not to place any real burden on the

covenantor, but merely to create an obligation to be used (no doubt, in a strict legal sense, quite legitimately) in reducing the covenantor's liability to taxation. For these reasons, the order of LAWRENCE, J., should, in my judgment, be reversed, and the decision of the commissioners restored.

A
GODDARD, L.J. : It is conceded that, if Payton was bound by this deed to pay to the trustee one-quarter of the sum apportioned to him out of the income of Birmingham Criterions, Ltd., under the Finance Act, 1922, s. 21, as extended by the Finance Act, 1936, s. 19, he is entitled to succeed in this appeal. The question which falls for decision, B
therefore, is one between the settlor and the trustee, and depends on the true construction of cl. 1 and 2 of the deed in question. The intention of the settlor has to be ascertained from the language of the deed, regard being had also to the surrounding circumstances. In my opinion, the deed itself shows that the settlor's intention was, in euphemistic language, C
so to order his affairs that the tax attaching under the appropriate Acts should be less than it otherwise would be. If one reads cl. 1 and 2 together, one sees that the settlor covenanted to pay to the trustee an annual sum (subject to deduction of the tax at the standard rate) equal to one fourth part of his income as computed for the purpose of the D
Income Tax Acts, less certain specified deductions. The word "computed," which frequently occurs in Acts relating to income tax, is not a term of art. It means, according to the dictionary, "determined by calculation," and the computation or calculation determines the amount both for the purpose of income tax at the standard rate and also for the E
purpose of sur-tax, which is an additional duty of income tax. In my opinion, the clear intention of the settlor is to pay to the trustee one fourth part of the income on which he is liable to be taxed, excluding the amount received by him as an underwriting member of Lloyds. The computation of his income would include such part of the income of F
Birmingham Criterions, Ltd., as had been apportioned to him. His return would show the total income from all sources, and also the annual sums, annuities and interest which the Acts allow to be deducted, and the balance, less the amount of his earnings at Lloyds, is the sum a fourth part of which is to be paid to the trustee. Reliefs, in my G
opinion, do not come into the picture at all. They are granted, not by way of deduction from the income returned, but by setting off the tax on the amount of relief granted against the tax otherwise payable. As the Acts provide that the income of the company which the commis- H
sioners require to be distributed is to be deemed to be the income of the members of the company, and make each member liable for sur-tax on the amount apportioned to him, it follows, in my opinion, that the apportioned amount is his income for the purpose of the Acts. I cannot see that the fact that the deed expressly refers to deductions of sums which in any case are allowed by law affects the matter in any

way. The probable reason for referring to them is to make it clear that the sum earned at Lloyds, which has to be expressly mentioned, as otherwise it could not be deducted, is not to be the only deduction to be taken into account in calculating what is to be paid to the trustee, and that the settlor is to have the benefit of the statutory deductions as well. For myself, I get no assistance from considering whether or not a wife's income would have to be included, for this purpose, in calculating the amount, nor is it necessary to decide it, as this matter is not raised by the case. Moreover, if a person minded to make such a settlement as that which we are now considering were married to a wife possessed of an income, I should expect that her income would be dealt with in the deed specifically. All we have to do is to determine the true construction of the deed, which, in my opinion, is reasonably clear. I think that the appeal should be allowed.

Appeal allowed with costs in both courts. Leave to appeal to the House of Lords.

Solicitors: *Marshall & Hicks Beach* (for the appellant); *Solicitor of Inland Revenue* (for the respondents).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

HESKETH v. LIVERPOOL CORPORATION.

[LIVERPOOL AUTUMN ASSIZES (Stable, J.), **November 20, 21, 22, 1940.**]

Street and Aerial Traffic—Aerial traffic—Aerodromes—Licensing conditions—Obstructions in vicinity of aerodrome—Aeroplane accident due to unlighted obstruction—Obstruction present in contravention of condition—Contributory negligence of pilot—Air Navigation (Consolidation) Order, 1923 (S.R. & O., 1923, No. 1508), r. 5 (2), Sched. IV, Sect. II, 16 (2) (a) (ii).

The plaintiff was injured through striking some trees when landing an aeroplane at night on an aerodrome in respect of which a licence had been granted to the defendants under the Air Navigation (Consolidation) Order, 1923, r. 5 (2). The licence provided for the use of the aerodrome for the landing or departure of any aircraft carrying passengers for reward and one of the conditions of the licence was that no obstruction in the line of flight beyond the perimeter and within half-a-mile of the aerodrome should subtend at the nearest point of the perimeter a greater angle than $5^{\circ} 30'$ (approximately 1 in 10). The trees into which the plaintiff crashed were about 50 yds. outside the perimeter of the aerodrome, and were admittedly there in breach of the condition. There were two floodlights in operation, the green light was showing on the control tower, and the plaintiff was landing by the radio beacon. The trees were not indicated by fixed red lights as is required by the Air Navigation (Consolidation) Order, 1923, Sched. IV, Sect. II, 16 (2) (a) (ii) in the case of dangerous obstructions within 1,000 yds. of the boundary of the landing area. It was contended that the condition inured only for the benefit of persons landing in an aircraft carrying passengers for hire or reward, and that the plaintiff, who was engaged in Army co-operation work, could not avail himself of its breach. It was also contended that the plaintiff had been guilty of contributory negligence in that, as he knew of the existence of the trees, he was in fault in hitting them:—

HELD: (i) since the presence of the trees constituted a breach of the statutory condition, the plaintiff was entitled to succeed, and the

fact that the aeroplane was not carrying passengers was immaterial. Even apart from statute, he was entitled to succeed at common law on the ground that the trees constituted a trap.

(ii) the plaintiff had not been guilty of contributory negligence, for the mere fact that he knew of the existence of the trees without their significance making an impression on his mind was not sufficient to constitute contributory negligence.

[EDITORIAL NOTE.] Questions of negligence are usually mainly dependent upon the facts and the present case is no exception to the rule. The consideration of a case arising out of an accident in the course of night flying has many novel features which have not previously been the subject of judicial comment, and it is thought that the judgment in the present case will be helpful. Unfortunately, at the present time civil flying has practically stopped in England, but, no doubt, in other parts of the Empire the matters here considered will be of immediate interest.

AS TO NIGHT FLYING, see HALSBURY, Hailsham Edn., Vol. 31, pp. 892, 893, para. 1445; and FOR CASES, see DIGEST, Vol. 42, p. 880, Nos. 259, 260.]

ACTION for damages for breach of warranty, breach of statutory duty and negligence at common law in connection with an accident suffered by the plaintiff when landing his aeroplane at an aerodrome of which the defendants were licensees. The facts and the arguments are fully set out in the judgment.

Edward Wooll and *E. E. Edwards* for the plaintiff.

F. A. Sellers, K.C., and *H. I. Nelson* for the defendants.

STABLE, J.: The plaintiff, Captain Hesketh, claims damages on the basis of a breach of statutory duty, common law negligence, and a breach of warranty. It appears that, on the night in question, he was flying an aeroplane which was the property of the company in whose service he was. The aeroplane was engaged on Army co-operation work before the landing which is the subject-matter of this action. I am satisfied here that, in so far as the claim rests on breach of contract, there was no contract as between Captain Hesketh as an individual and the corporation in connection with the use of the airport. The contract was in fact a contract with Captain Hesketh's employers, who paid the corporation for the facilities of the airport.

What happened was this. On the night of Apr. 25, 1939, Captain Hesketh, having finished the Army operations upon which he was engaged, got into touch with Barton by radio-telephony. He asked Barton to place the radio beacon in operation, and said he was returning to Speke. Barton replied: "The Speke radio beacon is in operation." Captain Hesketh duly acknowledged that message. Later on, he reported to Manchester by means of wireless telephony, and conducted a conversation on the wireless telephone. At 10.2 p.m., Captain Hesketh reported to Barton that he had finished his Army co-operation work in Manchester, and that he was returning to Liverpool. He asked: "Shall I change the transmission frequency of Liverpool radio beacon?" A minute later, he got a message from Barton: "Change transmission frequency of Liverpool in respect of Liverpool radio beacon." He acknowledged

the message, and it was the view of the man at Manchester, it was the view of Captain Hesketh, it was the view of Shacklady, and it was also the view of certainly one, if not more, of the very experienced pilots who have given evidence before me in this case that that constituted permission to Captain Hesketh to land at Speke Airport.

- A In order to make this intelligible, I ought to add that this radio beacon is a scientific device to facilitate landing, particularly in fog. Pilots are in the habit of landing by the beam, or of approaching by the beam, under conditions when, as a matter of fact, they can see perfectly well, because it is a good thing to practise such landing under normal and
- B easy conditions in order that one may not fail when one has to do it under extraordinary or difficult conditions. The first matter upon which there is a conflict of evidence is as to whether, at the material time, the Speke Wood floodlight was the only floodlight lit, or whether what has been described as the River floodlight was lit as well. I have come
- C to the view that there were two floodlights lit. There is also some controversy as to whether the green light on the control tower was showing. With regard to that, I accept the evidence of those witnesses who said that it was lit, and who said that they saw it. Captain Hesketh has told me that, as he was coming down the beam, he swung
- D out over the Mersey, taking a lefthand turn, that he swung over Speke Hall, making around to the Speke Wood floodlight, that he was minded to leave that floodlight on his left and make a landing approximately on the north-east side of the floodlight, but that, seeing that there was some warning light on that area of the aerodrome, he decided, for a
- E very good reason, to deflect his machine a matter of a few yards in order to effect a landing somewhere else. He made what has been described as a slight S bend, and made a run to the southerly side of the floodlight.

- What happened to Captain Hesketh was this. Some 50 yds. outside
- F the perimeter of the aerodrome, and within a matter of certainly not more than 200 yds. to the south of the floodlight, were a number of trees. The aeroplane hit one of them, and that was what caused the crash. In my judgment, the existence of those trees at that spot was a contravention of the conditions upon which the licence was granted.
- G There is no doubt about that. The witnesses are unanimous on the matter, as, indeed, they must be. The simplest calculation establishes that fact beyond any question or doubt. The Air Navigation (Consolidation) Order, 1923, r. 5 (2), provides as follows :

- H The Secretary of State may grant a licence in respect of an aerodrome on such conditions as may be prescribed or specified in the licence, and any conditions so prescribed or specified shall be complied with by the proprietor of the aerodrome as if they were contained in the order.

That is to say, the Secretary of State grants a licence which contains certain conditions, and the proprietor of the aerodrome is under the same obligation to obey the conditions and observe the terms of the

conditions as if they were set out in a statutory order made in accordance with the powers under which the Air Navigation (Consolidation) Order, 1923, was made.

The licence under which Speke Aerodrome is operated is as follows :

This aerodrome may be used as a regular place of landing or departure by any aircraft carrying passengers for hire or reward, provided that under the conditions prevailing at the time, and at the weight at which such aircraft is being operated. . . . (c) No obstruction in the line of flight beyond the perimeter, and within half-a-mile of the aerodrome subtends at the nearest point of the perimeter a greater angle than $5^{\circ} 30'$ (approximately 1 in 10).

There is no doubt that these trees were an obstruction which violated the terms of that condition, Counsel for the defendants has argued that, if that condition confers any rights upon anybody to sue for damages, it inures only to the benefit of persons landing in an aircraft carrying passengers for hire or reward. I do not accept that contention. I think that the condition is that, if the proprietors of a particular piece of land want to have it licensed as what I may call a public aerodrome and are granted a licence subject to that condition, then their statutory obligation is to see that that piece of ground conforms to the conditions laid down in the licence. That is their obligation, and, if they fail to discharge it, and, as a result, some person who is lawfully using the aerodrome is injured, that person has a right to recover damages.

However, the matter does not rest there. Quite apart from this condition, which admittedly was not observed, the Air Navigation (Consolidation) Order, 1923, Sched. IV, Sect. II, 16 (2) (a), provides as follows :

At every aerodrome open to public use and used for night flying the following requirements shall be complied with during the working hours of the night service . . . (ii) As far as possible, fixed red lights must be displayed on all obstructions within 1,000 yds. of the boundary of the landing area and constituting a danger to aircraft approaching or leaving the aerodrome in a normal manner.

There is no doubt that this obstruction was not lit, and there is equally no doubt, on the evidence, that, quite apart from the condition in the licence, it ought to have been lit in accordance with the statutory direction. We have had it in evidence that, after the accident happened, the attention of Wing-Commander Wilkins was called to the matter, and within a very short space of time the offending trees were removed.

I am prepared to go further than I have already done, and say that there is no doubt that the Liverpool Corporation have taken infinite pains to make Speke Aerodrome an excellent one, but, in overlooking these trees, in my view, they were guilty of negligence at common law, and I should be prepared to hold that, quite apart from the statutory requirements, these trees constituted a trap.

The answer to the case is that Captain Hesketh was guilty of contributory negligence. I will deal with these matters in order. It is suggested, in the first place, that Captain Hesketh was doing something wrong by coming down when the green light was not showing. In my view, it is quite plain that no red light prohibiting a landing was displayed

at the appropriate control. In his evidence, Captain Andrews referred to some local regulations which he rather suggested imposed on pilots the obligation not to land until permission had been given by a visual signal. Upon inquiry, it was discovered that there were no such regulations in the only sense in which that word can properly be used.

- A It was suggested, however, that it was a custom not to land until such a signal had been given. In the first place, I am satisfied that the green light was showing. Nobody suggested any reason why it should not be, and nobody has suggested that they were endeavouring to tell Captain Hesketh not to land. It is perfectly obvious that everybody thought
- B that he was going to land. As I say, I am satisfied that the green light was showing and that Captain Hesketh saw it.

- Having regard to the evidence of the very experienced pilots I have heard, I am satisfied that everybody concerned thought that Captain Hesketh had acted as though he had the right of way, and that, having
- C got the message from Barton, he was entitled to go in by the beam and land his machine at the aerodrome at Speke, subject to any emergency message telling him not to do so.

- However, if I am wrong on the facts as to the light being lit, and if Captain Hesketh had to land without it, then the third answer to that
- D point seems to me to be absolutely conclusive—namely, that the absence of light had nothing whatever to do with this accident. Nobody has suggested that it had. If there had been 50 ground lights, and Captain Hesketh had come down to the altitude and over the spot selected, this accident would have happened in exactly the same way,
- E and the presence or absence of ground lights in any number has nothing whatever to do with it.

- The second contention, which was put forward somewhat faintly, was this. As both floodlights were on, the best place to come in was more or less on the southerly corner of the aerodrome, where it meets the
- F River Mersey. I have no doubt that that was a very excellent place at which to come in, with the wind in that direction, and no possible complaint could have been made if a pilot had done so, but, at the same time, it was not the only place to come in, and there is no possible ground for suggesting that the point at which Captain Hesketh did approach
- G the aerodrome, roughly south of this floodlight, was an improper place to attempt the landing. Nobody has suggested that it was.

- The next, and perhaps the most important, point made against Captain Hesketh is that, having flown over Speke Hall, he passed roughly north-east, made a swing to the left by the aircraft identification beacon to
- H alight, came down again approximately in a south-south-westerly direction, and then made a righthand turn before making the landing. I am satisfied that, in fact, he did nothing of the kind. If he had approached on a righthand bend, it would have been a breach of the regulation in force as to the manner of landing at the airport. Again, in my judgment, however, it would have had nothing whatever to do

with this accident, which, as I have said, was caused simply and solely by the presence on the fringe of the perimeter of an obstruction which had no business to be there, and, if it was there, ought to have been lit up.

The next allegation against Captain Hesketh is that he was flying badly, and that he was flying too low. In my judgment, he was not. A
The last ground upon which contributory negligence is alleged is that Captain Hesketh knew—I pause on the word “knew”—of the trees, and that, as he knew of them, if he did not take care to see that he did not hit them, that was his fault. I think that Captain Hesketh did know of the trees in the sense that he had seen them, just in the same B
way as, if I were asked, “Do you know of any trees round Newsham House?” I should say: “Yes. I suppose there are some. I am pretty sure that there are.” However, if I were asked to draw a map of the garden putting in the trees, I should not have any idea of their number or position. I have no doubt that Captain Hesketh was aware of the C
existence of some trees, but I do not think that the significance of the trees had made any impression upon his mind. Why, otherwise, should Squadron-Leader Clapham, who held the post of instructor to the Aero Club at Speke for some years, say that he knew of the trees, in a sense, subconsciously? He also said: D

Until the accident, their significance had never impressed my mind, but the moment there was an accident, of course I looked at the trees in that light at once, and I recognised the potential danger they were.

It would be stretching the doctrine of contributory negligence greatly to say that a pilot landing at a place like Speke Aerodrome was guilty of contributory negligence because he was caught in a trap of this nature. E
If he had sat down and made a survey of the surroundings of the airport, and if he had analysed every possible danger, he might have avoided the accident. In my judgment, as I have already said, this is really an undefended action, the sole cause of this accident being the presence of F
these trees, without any sort of light, in a place where they had no business to be at all.

Judgment for the plaintiff for £6,500 and costs.

Solicitors: *Barrell, Son & Co.* (for the plaintiff); *Laces & Co.* (for the G
defendants).

[Reported by M. D. CHORLTON, Barrister-at-Law.]

ROWLEY v. T. A. EVERTON & SONS, LTD.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Hawke and Humphreys, JJ.), **October 29, 1940.**]

Magistrates—Summary jurisdiction—Limitation of time—Quarry machinery improperly fenced—Metalliferous Mines Regulation Act, 1872 (c. 77), s. 34 (1)—Quarries General Regulations, 1938 (S.R. & O., 1938, No. 632), reg. 14.

The respondents were the owners of a quarry and operated a sand hopper and a crusher platform. These machines had been installed at dates prior to Aug. 29, 1939, and, at and from that date, the whole of that machinery had been in operation. On Jan. 25, 1940, and Jan. 29, 1940, informations were laid against the respondents alleging that these machines were not properly fenced in accordance with the requirements of the Metalliferous Mines Regulation Act, 1872, and the Quarries General Regulations, 1938, reg. 14, and that the respondents had failed to comply with these regulations on Oct. 31, 1939, and Dec. 22, 1939. The above Act requires that an information shall be laid within 3 months from the time when the matter of such information arose. It was contended that the matter of the information had here arisen not later than Aug. 29, 1939, and, therefore, more than 3 months before the information was laid:—

HELD: the proceedings were not statute-barred.

[EDITORIAL NOTE.] In the case of a continuing offence, the statutory limitation does not, in general, apply, it being considered that, so long as the offence continues, it is repeated from day to day. For this purpose it is often necessary to ascertain exactly what the offence is, for, if the offence is the erection of dangerous machinery, it is complete when the machinery is completely erected. Here the statutory requirement is that the machinery should be kept securely fenced, and an offence is committed on every day on which it is not so fenced.

AS TO LIMITATION OF TIME ON SUMMARY PROCEEDINGS, see HALSBURY, Hailsham Edn., Vol. 21, pp. 598, 599, para. 1043; and FOR CASES, see DIGEST, Vol. 33, pp. 325-327, Nos. 392-395.]

Cases referred to:

- (1) *London County Council v. Cross* (1892), 61 L.J.M.C. 160; 26 Digest 509, 2139; 66 L.T. 731.
- (2) *Hull v. London County Council*, [1901] 1 K.B. 580; 26 Digest 503, 2105; 70 L.J.K.B. 364; 84 L.T. 160.
- (3) *Marshall v. Smith* (1873), as reported in L.R. 8 C.P. 416; 33 Digest 419, 1304.

APPEAL by way of case stated by the Stourport-on-Severn justices. The respondents were charged under the Quarries General Regulations, 1938, reg. 14 (1), (2), (3), in that they unlawfully failed securely to fence certain dangerous parts of machinery at their quarry. The machinery in question was a Keen sand hopper and a crusher platform, it being alleged in respect of the latter that there was not a continuous skirting board on it. The machinery in question had been installed at various dates between Nov. 12, 1938, and Aug. 29, 1939. It was all in operation on and after the latter date.

Valentine Holmes for the appellant.

Gerald A. Gardiner for the respondents.

VISCOUNT CALDECOTE, L.C.J.: The respondents were charged under three informations on Jan. 25, 1940, with offences under the Quarries General Regulations, 1938 reg. 14. Reg. 14 (1) provides as follows:

Every flywheel and all exposed and dangerous parts of machinery shall be kept securely fenced. A

The first information was a charge that that regulation had not been complied with by the respondents. When the matter came before the magistrates, the point was taken that, under the Metalliferous Mines Regulation Act, 1872, s. 34, it is provided that:

Any complaint or information made or laid in pursuance of this Act shall be made or laid within three months from the time when the matter of such complaint or information respectively arose. B

The Quarries General Regulations, 1938, were made under the Metalliferous Mines Regulation Act, 1872. The magistrates decided the question adversely to the appellant, who is a divisional inspector of mines, on the ground that the information was laid more than three months from the time when the matter of the information arose. C

There is one other provision at which it is necessary to look. The Metalliferous Mines Regulation Act, 1872, s. 31, provides as follows: D

Every person who is guilty of an offence against this Act shall be liable to a penalty not exceeding, if he is an owner or agent, £20, and if he is any other person £2, for each offence; and if an inspector has given written notice of any such offence, to a further penalty not exceeding £1 for every day after such notice that such offence continues to be committed.

In the view which I have formed, the information appears to have been laid within three months from the time when the matter of the information arose on the ground that the offence charged was that on a certain day the machinery in question was not kept securely fenced. I am quite unable to accept the contention that, because the machinery had not been kept securely fenced on some days more than three months before the date of the information, the matter of the information had then arisen. The only possible difficulty in this case is due to the cases to which we have been referred, but, upon examination of those authorities, I see nothing in them to affect the view which I have formed. E

In *London County Council v. Cross* (1), the offence charged was that the defendant erected a building outside the building line. That being the offence, it is quite clear to me that the court was right, if I may respectfully say so, in the conclusion at which it arrived—namely, that the matter of the information arose when the building was erected. F

In *Hull v. London County Council* (2), the court dealt with the point very briefly, holding that, in the view they formed of the case, it did not really arise. The court thought that no offence had been committed, but BRUCE, J., went on to say, at p. 589: G

Further, as to the point raised by the case whether the prosecution of the alleged offence is barred under the Summary Jurisdiction Act, 1848, s. 11, by lapse of time, H

we think it is. If any offence was committed it was, we think, complete on June 20, 1899—the date on which the said sign was completely affixed to the premises.

That was a view which the court apparently would have taken if it had thought that an offence had been committed under the section under which the information was laid. The offence charged was :

A . . . that the appellant . . . did unlawfully extend a projection beyond the general line of buildings of Seven Sisters Road and Campbell Road.

I feel bound to say that, if this expression of opinion had been necessary to decide *Hull v. London County Council* (2), I should have found great difficulty in agreeing with it. However, it really seems to have been an expression of the court's opinion which is not binding upon us even if the case is one which is on all fours with the present case.

In *Marshall v. Smith* (3), the provision under which the appellant in that case was charged was :

C . . . the external walls of every new building . . . shall be of the following minimum thickness. . . .

Then there was a paragraph in the provisions which provided as follows :

D . . . in case any offence under any of the foregoing bye-laws shall continue, the person offending shall be liable to a further penalty of not exceeding 40s. for each day during which such offence shall continue after written notice of the offence has been given by the local board to the offender.

Looking at the structure of the provisions of the bye-laws under which the charge was brought, the court were of opinion that the offence was that the appellant built the wall, and, having arrived at that decision, they thought that the offence charged was not a continuing offence within bye-law No. 42, and, therefore, if the matter of the information arose at all, it did so more than 6 months before the date of the information. In my view, these cases do not require us to come to any conclusion other than that which I am clearly of opinion is the right one. I think that the magistrates came to a wrong decision, and the case must be remitted to them for decision upon that basis.

HAWKE, J. : I agree.

G HUMPHREYS, J. : I am of the same opinion. The argument of counsel for the respondents was certainly a startling one. The offence charged in these informations was the failure to comply with a bye-law which requires that certain dangerous machinery shall be securely fenced. It must be assumed that the allegation was that on a particular day—in fact, a particular day is mentioned in the information—it was found that the dangerous machinery was not securely fenced. Counsel for the respondents says : “No offence is committed. The matter is statute-barred, because this man had been committing this offence on previous occasions over a period of 6 months.” I rather agree with counsel for the appellant that, if that is the result, the sooner the law is altered the better. However, I do not think that that is the

law, or that it ever was the law. I do not think that it is in the least the meaning of the Summary Jurisdiction Act, 1848, s. 11, which provides practically what is provided in the Act with which we are dealing—namely, that the matter of complaint must have arisen within 6 months of the time when the proceedings are instituted. I am glad to find that this decision does not, in my opinion, conflict with any of A the previous decisions of this court.

In *London County Council v. Cross* (1), as my Lord has pointed out, the whole point was whether the person who erected a building contrary to a certain Act of Parliament had committed an offence for which he could be prosecuted more than 6 months after the date when he had B so erected the building. The answer was that he had not, because the Summary Jurisdiction Act, 1848, says that the matter of complaint must have arisen within 6 months, and it had not. The whole offence there was the erection of a building.

I now come to *Hull v. London County Council* (2). I am not sure C that it is necessary to express any opinion as to whether that case would have been decided to-day in the same way as it was in 1901. When one looks at the facts, one sees that it was a very peculiar case. Under the London Building Act, 1894, there is a provision that no projection from any building shall extend beyond the general line of buildings D in any street. The person who was prosecuted and convicted there was said to have offended against that provision in some way, inasmuch as he was a person who was responsible for a projection which extended beyond the general line of building, and the form of the information against him was that he did on a named day extend E a projection beyond the general line of buildings. If anything was decided upon this point—the case really turns upon quite a different point—I think that it was that it could not be said that he had extended a projection on a particular day. In fact, however, he had extended that projection, which continued to extend beyond the general F line of buildings, more than 6 months before. Therefore, I do not think that this decision conflicts with the decision in that case. As to *Marshall v. Smith* (3), the other case which has been referred to, I prefer to say nothing except that I do not think that it assists us in any way in the decision of this matter. G

Appeal allowed with costs. Case remitted to magistrates to hear and determine.

Solicitors: *Solicitor to the Board of Trade* [(for the appellant); *Lumley & Lumley*, agents for *Holyoake & Foster*, Droitwich (for the respondents). H

[Reported by D. K. BELCHER, Barrister-at-Law.]

CAMERON v. ROYAL LONDON OPHTHALMIC HOSPITAL.

[KING'S BENCH DIVISION (du Parcq, L.J., sitting as an additional judge), **October 16, 17, 18, 1940.**]

Master and Servant—Wages—Payment other than in coin of the realm—Stoker in hospital—Whether hospital a domestic establishment and stoker a domestic servant—Truck Act, 1831 (c. 37), ss. 1, 4, 20.

The plaintiff was employed by the defendant hospital as a stoker in the engineering department. His chief duty had been to stoke the boiler by hand, but, when mechanically-fired boilers were introduced, the plaintiff was styled a mechanic and performed certain duties requiring skill, such as cleaning and repairing the boiler, and repairing the coal conveyor. He also did certain work on the pumps and turbines, did minor repairs to taps and lights, and assisted the engineers in the repair of electrical and mechanical appliances. In a claim under the Truck Act, 1831, s. 4, for wages not paid in coin of the realm:—

HELD: the hospital was a domestic establishment and the plaintiff was employed therein as a domestic servant. Although he had often performed tasks which a domestic servant ordinarily might not be able to do, everything which he did was for the upkeep of the establishment and for the convenience and comfort of those living in it. Since the Act does not apply to domestic servants, he was not, therefore, entitled to recover.

[EDITORIAL NOTE. The general conception of a domestic servant is one who is employed about his master's house for the purpose of administering to the needs of the master, the members of his household or his guests. In view of this conception, it might at first sight seem strange that an employee doing the semi-skilled engineering and mechanical work which the plaintiff was employed to do should be classed as a domestic servant. It is here held, however, that the hospital was a domestic establishment, and that, therefore, although the plaintiff performed tasks which a domestic servant ordinarily might not be able to do, everything which he did, whether in the course of routine or in an emergency, was for the **upkeep** of the establishment and for the convenience and comfort of those living in it, and that he was, accordingly, a domestic servant.

AS TO WHO IS A DOMESTIC SERVANT, see HALSBURY, Hailsham Edn., Vol. 22, pp. 118, 119, para. 198; and FOR CASES, see DIGEST, Vol. 34, pp. 37, 38, Nos. 138-149.]

Cases referred to:

- (1) *Pratt v. Cook Son & Co. (St. Paul's), Ltd.*, [1940] 1 All E.R. 410; Digest Supp.
- (2) *Re Vellacott*, [1922] 1 K.B. 466; 44 Digest 1305, 96; 126 L.T. 412.
- (3) *Re Junior Carlton Club*, [1922] 1 K.B. 166; 44 Digest 1304, 83; 91 L.J.K.B. 85; 126 L.T. 216.

ACTION claiming under the Truck Act, 1831, s. 4, £344 15s. for board at 17s. 6d. per week for 394 weeks, £295 10s. for lodging at 15s. per week for 394 weeks and £29 11s. for laundry at 1s. 6d. per week for 394 weeks, less £12 8s. in respect of holiday allowance, which sums represented so much of the wages earned by the plaintiff in the employment of the defendant from Oct. 3, 1929, to May 1, 1937, as a stoker by way of manual labour as had not been actually paid to him in current coin of the realm. The claim in respect of board was abandoned as being admittedly not maintainable by reason of the provisions of the Truck Act, 1940. The defendants admitted providing the plaintiff with board,

lodging and laundry throughout the period of his employment with them, but contended that they were not of the value alleged. They also contended that the plaintiff was not at any time while in their employ engaged in manual labour or otherwise as a workman within the terms of the Truck Acts, 1831 and 1887. The plaintiff was employed by the defendants as a stoker in the engineering part of their hospital. His duties mainly consisted in stoking the boilers by hand, and as he acquired more experience and knowledge he was promoted, and was finally styled a mechanic. Later, mechanically-fired boilers were introduced in place of the hand-firing system, and the plaintiff then performed certain duties requiring skill, such as cleaning and repairing the boiler and repairing the coal conveyor. He also did certain work on pumps and turbines, did minor repairs to taps and lights, and assisted the engineers in the repair of electrical and mechanical appliances. In addition he slept on the premises in order to be able to deal with any matter requiring attention during the night.

B. J. M. MacKenna for the plaintiff.

Tristram Beresford, K.C., and *Michael Bull* for the defendants.

DU PARCQ, L.J.: The plaintiff claims the sum of £657 8s. He says that, by virtue of the provisions of the Truck Act, 1831, s. 4, he is entitled to recover the sum which, after certain deductions, amounts to that figure. It is plain, I think, that, if he was not a domestic servant when he was in the employment of the defendant hospital, he is entitled to recover part of that sum. I have no doubt that he comes within the definition of "workman" in the Employers' and Workmen Act, 1875, s. 10, which is for the present purpose the material section.

If—and that is the question in the case—he was not a domestic or menial servant, and even if he was not a domestic servant, he would not be entitled to recover the whole of his claim, because of the provisions of the Truck Act, 1940. The recent decision of *Pratt v. Cook Son & Co. (St. Paul's), Ltd.* (1) in the House of Lords made plain what had previously been doubtful, and, but for the Act of 1940, again on the assumption that Cameron was not a domestic servant, he would have been entitled to recover under every head of his claim. The Truck Act, 1940, however, has restricted the right of persons who, as appears from the decision of the House of Lords, were entitled to make such a claim, and, where a stoppage or deduction from the wages of the workman might lawfully have been made under the Truck Act, 1831, s. 23, if an agreement therefor had been made in writing and signed by the servant, an action of this nature is barred. Counsel for the plaintiff conceded that, by reason of the Act of 1940, he could not maintain any claim in respect of board, because that is one of the matters in respect of which a stoppage or deduction from the wages of the worker might lawfully have been made under the 1831 Act. As to the claim for laundry, he says, and rightly says, that there is nothing in the Act of

1940 to affect the plaintiff's claim at all. It is elementary law, and I need not say that people are well aware, that permitting a man to occupy a bed in a house is not a demise of premises, and it is equally plain, I think, that there is nothing in the Truck Act, 1831, s. 23, to cover such a service as laundry. Thus, the only question left is whether
 A or not Cameron was a domestic servant when he was employed by the Royal London Ophthalmic Hospital.

There are one or two things that I think I ought to remember in dealing with that question. It is, as counsel for the defendants quite truly says, a question of fact, but, like other questions of fact, it has
 B to be decided with regard to certain principles. In other words, if I were trying this case with a jury, it would not be right for me to leave to the jury the question whether or not Cameron was a domestic servant without some explanation of what those words must mean from the point of view of their legal interpretation. On the other hand,
 C one must not forget that in the last resort it is a question of fact, and about questions of fact people may take different views. Another thing which I think it is important to remember is this. I suppose there are very many Acts of Parliament in which the phrase "domestic servant" appears. Nothing is more dangerous than to argue from
 D decisions as to the meaning of the words in one Act of Parliament to their meaning in another Act of Parliament. One must have regard to their context. Here one has a double danger. First of all, one may forget that it is a question of fact, and may be tempted to follow the decisions of other judges in cases where the facts were not precisely
 E similar, and, secondly, one may be induced to pay too much attention to the interpretation of the phrase in the Act. Having said that in order to show that I have not been unduly affected by other decisions, however, I must say that I have derived assistance from some words of ROCHE, J., in one of the cases which were cited to me, although it
 F is quite true that he was there dealing with a different Act of Parliament. I am not in the least influenced by the fact that in *Re Vellacott* (2), ROCHE, J., decided that a man employed as a stoker in that particular case was a domestic servant. The judge most prudently and with foresight said, at p. 475 :

G I am not going to decide any other case of employment as a stoker except this one.

That was a warning that he was not intending to lay down any general rule, and I therefore pay no regard to that.

However, in *Re Junior Carlton Club* (3), which is also a case under the
 H Unemployment Insurance Act, 1920, after a reference to a textbook, and after saying, as I shall say myself, that he was not attempting to formulate a definition of a domestic servant "even for the purposes of this Act"—namely, the Unemployment Insurance Act, 1920—the judge goes on to say, at p. 170 :

But if I had, in my own words, to describe what are the characteristics of such

a servant I should express it, and do express it for present purposes, in the way that I sought to express it in the course of the argument in this case—namely, that domestic servants are servants, whose main or general function it is to be about their employers' persons, or establishments, residential or quasi-residential, for the ministering to their employers' needs or wants, or to the needs or wants of those who are members of such establishments, or of those resorting to such establishments, including guests. That description, which, as I say, is not intended to be an exhaustive one, certainly covers the case of a club.

I am not going to attempt a definition, and anything I say is not intended to be exhaustive or to include other cases as probably coming within the Act. There is no doubt, of course, that the plaintiff was a servant. Was he a domestic servant? I think that what ROCHE, J., said in that case may also be applied to this case, and I would add this. Again, this is not in the least an exhaustive definition, or, indeed, a definition at all, but it is the kind of observation which I should have thought it proper to make to a jury if I were leaving this question of fact to them. The mention of a phrase like "domestic servant" calls up something to the mind of probably everybody. To the mind of a man with a small house and of modest means, it probably calls up a picture of a maidservant. Others will be more likely to think of a butler and a footman and a chauffeur, and, one may add, a gardener or gardeners, and so forth. What common quality have all these people? They are all within the statement of ROCHE, J., which I have just read, and I think that, when one looks at the Truck Acts, one is entitled to say that what Parliament had in mind in framing the definition of "workman" in the Employers and Workmen Act, 1875, s. 10, was that in modern civilised society the Truck Acts would work hardship, or at any rate would work with the greatest inconvenience, unless one excluded those people who are working in a home (*domus*) for the purposes of the upkeep and maintenance of the home. That is an obvious truism in the simplest case of all. If one is not entitled to pay the general servants partly in food and by the provision of sleeping accommodation, the lot of the unfortunate housewife would be more difficult than ever. In fact, it would be an almost impossible position, and the reason is not merely that the servant is treated as part of the family—I use the expression in the wider sense—but that he assists in the maintenance and the upkeep of the home, and does work in and about the home which, if it were not done by servants, would have to be done either by the employer, or, at great inconvenience, by someone from outside. I think, therefore, that, as a general rule—as I say, I am not laying down anything which is intended to apply to every case—where one finds what can properly be termed a domestic establishment, and where one finds that some of the work in that establishment is done by a particular person for the purposes of the upkeep and maintenance, and for the convenience of the members of the family, to keep the home going, and, perhaps one may say, in a particular case, to keep the home fires burning, there one has a domestic servant. Sometimes he is a highly skilled person. One needs to go no further than the kitchen to see that.

There are many great houses where they employ a chef, who would not hesitate to admit that he was a domestic servant, but who at the same time regards himself as an exponent of a great art. One may have a chauffeur who not only drives, but also attends to the engine and other parts of his employer's Rolls Royce. He is a domestic servant, but he is certainly no less a skilled engineer than the plaintiff in this case. I am not going to give more instances. It is quite clear that you may have a domestic servant within the meaning of the Act even although the servant is not working in what may properly be called a domestic establishment.

- B I propose to apply what I have said to the facts of this particular case. The first question, therefore, is whether this hospital can be brought within the terms of what I call a domestic establishment or *domus*. It would no doubt apply to a boarding school, and I think it could be applied also to a residential college and a university, and I have no doubt it applies to a hospital. Indeed, some hospitals are now commonly referred to as homes. One talks of a nursing-home, which is really part of a hospital, where the institution is run as a paying concern, and one talks of a mental home, and the word "domestic" may be applied to an establishment of that kind. The people who are regularly living there on the staff and those who are temporarily living there as patients in a wide sense may be regarded as a family, and certainly the establishment is of a domestic character as a whole.

What was the duty of this man Cameron? When one looks at the evidence, I do not think that there is any very great dispute about it.

- E I was quite satisfied that the chief maintenance engineer of the hospital was a scrupulously honest witness, and one finds from his evidence that the work done by the plaintiff at first was that of a stoker, and, as he got more experience, he got promotion and better pay, and picked up a good deal of knowledge which he had not got when he began, and eventually he was styled a mechanic. As a mechanic, he did certain things requiring skill, such as boiler cleaning and repairs to the boiler and to the conveyor which carries coal, and which was introduced in place of the old hand-firing system. He also did minor operations on pumps and turbines, burnt rubbish, and did what I may call odd jobs in the way of minor repairs, attending to the lamps and lighting, and helping to keep the department clean.

- H If one has a home, whether it be a private house or a hospital, which is extensive, in these days one must have methods of heating of a different character from what was considered sufficient in the days when the Truck Act, 1831, was passed, or even when the Employers and Workmen Act, 1875, was passed. Everybody who has been into large country houses knows that many of them built in comparatively recent days relied on coal fires for their heating, but now one will find that in many of them central heating has been adopted, and where there is central heating, there are boilers, and boilers need attendants, and that

seems to me a perfectly normal and natural thing in a large establishment. In a small establishment, with a small boiler, perhaps in the cellar below, it is left to the gardener, or even to one of the female staff, to attend to, but that cannot be done in a large establishment, and it is equally impossible in a large establishment—or, at any rate, it is inconvenient—to rely on calling in somebody from outside to attend to the boilers and do all that is necessary to them. There is no doubt that the plaintiff very often did things which a servant might not have been able to do, and, on the other hand, from time to time there were things he was asked to do which he was not able to do. No blame attaches to him for that. The work of an engineer or a mechanic covers a very great multitude of tasks and a great deal of very valuable work, but everything the plaintiff did, whether by way of routine work or in an emergency, was for the upkeep of the establishment and for the convenience and comfort of those living therein. A B

It is obviously convenient in a large institution of this kind to have somebody on the premises who can do that kind of work and who is available at all times. Indeed, in this hospital, I am satisfied that it was understood that, if anything went wrong during the night watches, the plaintiff could be called on to endeavour to put it right. That was one very good reason why he should be on the premises at all times and should be treated as one of the domestic staff, as he was. C D

I do not forget that he was paid overtime if he was called on to do work after his daily 8 hours had expired, but, on consideration, that does not really affect the question. It might well be arranged with an ordinary domestic servant that, if she was called upon to do work after a certain time of the day, she should be paid extra for it, and no doubt there are occasions in fact when a servant volunteers, or is willing, to do something beyond what is usually asked of her, and is rewarded for it. E

Having, as I hope, looked at the matter as I would have told a jury to look at it, and having decided it as a question of fact, I have come to the conclusion that the plaintiff was a domestic servant. I daresay that most people, if they had been asked, and using the expression colloquially, would not have spoken of him as a domestic servant, yet nevertheless I think that he was one according to the true meaning of that phrase, which is not limited to those who do only what one calls housework in the narrower interpretation. That being so, the plaintiff's claim fails, and there must be judgment for the defendants with costs. F G

Judgment for the defendants with costs. H

Solicitors : J. E. Churchill & Co. (for the plaintiff); Bircham & Co. (for the defendants).

[Reported by D. K. BELCHER, Barrister-at-Law.]

INLAND REVENUE COMMISSIONERS v. R. W. BLACK.
INLAND REVENUE COMMISSIONERS v. C. W. BLACK.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **November 25, 1940.**]

A *Income Tax—Disposition for more than 6 years—Covenant to pay difference between annual letting value of and income actually received from certain properties—Sums due in fact paid within 2 years—Finance Act, 1922 (c. 17), s. 20 (1) (b).*

B By a deed dated Dec. 16, 1936, the respondents covenanted to pay to a company which owned freehold and leasehold properties comprising flats, shops, garages and houses, and in which they had the controlling interest, an annuity in respect of each of the properties mentioned in the schedule to the deed, equal, in the case of the first respondent, to four-fifths, and, in the case of the second respondent, to one-fifth, of the difference between the annual letting value of such property and the net income actually produced thereby in each year, with a limit of £100,000. The periods in respect of which the annuities were payable began on dates specified in the schedule to the deed and continued until Feb. 28, 1944. The amount payable in respect of the period ended Feb. 28, 1937, was calculated on June 8, 1937, to be £51,188 17s., which was thereupon paid by the respondents in the stated proportions. The whole amount which the respondents covenanted to pay was in fact paid in the first 2 years. The Crown contended that the respondents could not deduct this amount in computing their total income for sur-tax for the year ended Apr. 5, 1937, on the ground that it was a payment by virtue of a disposition which could not exceed 6 years, since, when the appeal was heard in 1939, they had in fact paid the total amount which they had covenanted to pay. They also contended that, if any amount might be deducted, it could not, on the authority of *Inland Revenue Comrs. v. Mallaby-Deeley* (1), followed by *D'Ambrumenil v. Inland Revenue Comrs.* (2), exceed one-seventh of £100,000 in any one year:—

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HELD: (i) the respondents were entitled to make the deduction claimed. Sect. 20 (1) (b) of the Finance Act, 1922, does not specify a period that in the events which happen does not exceed 6 years, but one which by virtue of the disposition cannot exceed 6 years.

F (ii) as the disposition merely fixed the formula upon which payment was to be ascertained, there was payable by virtue thereof a varying sum—not a fixed sum as in the cases cited—and this varying sum was properly deductible.

[EDITORIAL NOTE. This is an interesting point on the construction of the Finance Act, 1922. s. 20 (1) (b), under which, in effect, a disposition of income is rendered ineffective for the purposes of avoiding income tax if, by virtue of the disposition, income is payable to or applicable for the benefit of any person for a period which cannot exceed 6 years. LAWRENCE, J., with whom the Court of Appeal wholly agreed, has rejected an argument advanced by the Crown that, since the total amount due under the deed was in fact paid in the first two years, the disposition came within the terms of the subsection. He held that the section does not deal with a period which, in the events which happened, did not exceed two years, but with one which, upon its proper construction, could not exceed 6 years, and pointed out that, if the appeal had happened to be heard earlier, it would have been impossible to foretell whether payments were going to be payable for a period of over 6 years or not. The Crown's argument, in effect, made the construction of the subsection dependent on the date of the appeal. It was also contended that, if any amount could be deducted, that amount must not exceed one-seventh of £100,000 on the authority of *Inland Revenue Comrs. v. Mallaby-Deeley* (1),

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followed by *D'Ambrumenil v. Inland Revenue Commissioners* (2). This argument is also rejected for the reason that in those cases fixed sums were payable, whereas here there was a variable amount. SIR WILFRID GREENE, M.R., points out that the limit of £100,000 might never have been reached, and that this argument was an attempt to re-write the covenant and had no basis in the contract between the parties or any real relation to the facts as they might turn out.

AS TO DISPOSITIONS FOR MORE THAN 6 YEARS, see HALSBURY, Hailsham Edn., Vol. 17, p. 269, para. 538; and FOR CASES, see DIGEST, Supp., Income Tax, Nos. 575a-576d, 674cc.]

Cases referred to :

- (1) *Inland Revenue Comrs. v. Mallaby-Deeley* (Sir H.), *Mallaby-Deeley* (Sir Harry) *v. Inland Revenue Comrs.*, [1938] 3 All E.R. 463; Digest Supp.; *on appeal*, [1938] 4 All E.R. 818.
- (2) *D'Ambrumenil v. Inland Revenue Comrs.*, [1940] 2 All E.R. 71; Digest Supp.

CASES STATED under the Finance Act, 1927, s. 42 (7), and the Income Tax Act, 1918, s. 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

The respondents, Robert Wilson Black and his son Cyril Wilson Black, were directors of, and had a controlling interest in, the Langford Property Co., Ltd., which owned freehold and leasehold properties comprising flats, shops, garages and houses. By a deed dated Dec. 16, 1936, the respondents covenanted to pay to the company in respect of each of the properties mentioned in the schedule to the deed an annuity equal, in the case of Robert Wilson Black, to four-fifths, and, in the case of Cyril Wilson Black, to one-fifth of the difference between the annual letting value of such properties and the net income actually produced thereby in each year. The total liability under the deed was £100,000, and the dates on which the annuities were to be payable for each property were to begin in 1937 and were to continue, subject to a certain provision for cessation, until Feb. 28, 1944. The deed provided that the first instalment of the annuity in respect of each property should be payable for the period from the date specified in the schedule until Feb. 28, 1937, on Mar. 25, 1937, the amount of each annuity for such period to be calculated immediately after Feb. 28, 1937. The amount payable in respect of the period ended Feb. 28, 1937, was calculated on June 8, 1937, to be £51,188 17s., of which sum four-fifths, namely, £40,951 1s. 7d., was thereupon paid by Robert Wilson Black, and one-fifth, namely, £10,237 15s. 5d., was paid by Cyril Wilson Black. The total amount which the respondents covenanted to pay was in fact paid in the first 2 years. The respondents contended that the respective payments were proper deductions in computing their total incomes for sur-tax for the year ended Apr. 5, 1937. The Crown contended that the sums were instalments of capital and were not deductible. The commissioners held that the sums were proper deductions and the Inland Revenue Commissioners appealed to the King's Bench Division.

LAWRENCE, J. : The question in these cases is whether the respondents are entitled to deduct for the purposes of surtax the sums paid by them to the Langford Property Co., Ltd., in the year ended Apr. 5, 1937, under a deed dated Dec. 16, 1936. The question arises upon the construction of the Finance Act, 1922, s. 20 (1) (b).

- A It was contended on behalf of the Crown that the sums paid could not be deducted because, when the appeal was heard in 1939, the respondents had paid the whole sum which they had covenanted to pay, and it was said, therefore, that the income was by virtue of a disposition payable for a period which could not exceed 6 years, since, in fact, it had been paid in 2 years.

- In my opinion, this argument is unsound. The section does not say a period which in the events that happen does not exceed 6 years, but which by virtue of the disposition cannot exceed 6 years. It is obvious that sums of money might have to be paid by virtue of the deed in question during a period which exceeded 6 years, and, if the appeal had happened to be heard earlier, it would have been impossible to foretell whether payments were going to be payable for a period of over 6 years or not. In the next place, it was contended that, even if some sum may be deducted, that sum cannot exceed one-seventh of the £100,000, which was the maximum amount which the respondents might be called upon to pay, because, in accordance with the decision in *Inland Revenue Comrs. v. Mallaby-Deeley* (1), followed by *D'Ambrumenil v. Inland Revenue Comrs.* (2), no higher amount than one-seventh could be deducted in any one year without lowering the figure paid in one of the other seven years below that figure, and then, so it was said, upon the authority of the above-cited cases, the income to be deducted must be the lowest amount paid in any year. In my opinion, this result does not follow from the cases cited, for in them the income paid by virtue of the disposition was a sum fixed by the disposition, whereas, in the present case, the disposition only fixes the formula upon which the payment is to be ascertained. In accordance with that formula, which can continue for more than 6 years, varying sums may be payable by virtue of the disposition, and these sums may, therefore, in my opinion, be deducted. This point was foreseen by WROTTESELEY, J., in *D'Ambrumenil's* case (2), at p. 75, and what he says there is in favour of the view taken by the commissioners, with which I agree. The appeal will be dismissed with costs.

- The Commissioners of Inland Revenue appealed from this decision.
The Attorney-General (*Rt. Hon. Sir Donald B. Somervell, K.C.*) and
H *Reginald P. Hills* for the appellants.
Terence N. Donovan for the respondent in the first appeal.
Frederick G. Grant for the respondent in the second appeal.

SIR WILFRID GREENE, M.R. : In my opinion, LAWRENCE, J., was perfectly right with regard to both the arguments presented on behalf

of the Crown. I do not wish to add anything to what he said, except just one word upon the second argument. The argument would have us in effect re-write the covenant and turn it into something which it emphatically is not. It would mean wording the covenant as a covenant to pay a sum of £100,000 in equal instalments over a period of 6½ or 7 years, whichever it is. That is not what the covenant says. It is not disputed that, but for the limit of £100,000, the fact that a variable sum becomes payable would not prevent the taxpayer from being entitled to a deduction. The existence of that limit of £100,000 is said to alter that position, and the way in which it is said to alter it is that the covenant ought to be treated as a covenant to pay £100,000 over a period of 7 years. If there is one thing which is, I should have thought, quite certain in the application of income tax law, it is that one must first of all ascertain what the true transaction is and then apply the tax provisions to it, and one is not entitled to re-write a contract or alter the terms of a covenant in order to bring it within the language of a particular section. In this case, it would not in the least follow that £100,000 would be the aggregate sum which in the event would fall to be paid. The limit might never be reached, and accordingly this attempt to re-write the covenant not merely has no basis in the contract between the parties, but has no real relation to the facts as they might turn out. The appeal, in my opinion, fails, and should be dismissed with costs.

CLAUSON, L.J. : I agree.

GODDARD, L.J. : I agree.

Appeal dismissed with costs.

Solicitors : *Solicitor of Inland Revenue* (for the appellants) ; *Wedlake, Letts & Birds* (for the respondent in the first appeal) ; *Ashurst, Morris, Crisp & Co.* (for the respondent in the second appeal).

[*Reported by W. K. SCRIVENER, ESQ., Barrister-at-Law.*]

Re BIKKER.

[CHANCERY DIVISION (Morton, J.), November 27, 1940.]

Emergency Legislation—Evacuation area—Mortgaged property—Appointment of receiver in respect of interest in arrear—Defence (Evacuated Areas) Regulations, 1940 (S.R. & O., 1940, No. 1209).

A By a mortgage, dated Sept. 15, 1937, the borrower and his surety jointly and severally covenanted to repay the mortgage money on Mar. 15, 1938, with interest at $4\frac{1}{2}$ per cent. per annum. No payment in respect of interest was made in Sept., 1939, or in Mar., 1940. The interest was, therefore, one year in arrear on July 16, 1940, when an order was made under the Defence (Evacuated Areas) Regulations, 1940, declaring the part of England in which the mortgaged property was situate to be an evacuation area. The mortgagee applied to the court for leave to appoint a receiver of the mortgaged property :—

B HELD : the mortgagee was entitled to be granted leave to appoint a receiver in respect of the sums accrued due to him by way of interest before the commencement of the evacuation period. The evidence being that no written demand for the repayment of the capital had been served before the commencement of that period, the remedy could not extend to any capital sum.

C [EDITORIAL NOTE. This case was argued and decided on the footing that no written demand for the repayment of the capital had been served upon the mortgagor. It was later discovered that, in fact, such a demand had been served on Nov. 15, 1938. Had this fact been proved at the proper time, it would seem that the receiver, when appointed, would have been able to apply money coming into his hands in repayment of capital as well as interest. In the circumstances, however, the court refused to reopen the matter, and it was ordered that the order originally made was to stand. As will be remembered, special regulations were made with regard to evacuation areas. The present decision considers the effect of the relevant regulations in so far as they affect the appointment of a receiver by a mortgagee.

D AS TO EVACUATION AREAS, see BUTTERWORTHS' EMERGENCY LEGISLATION SERVICE [13] 144.]

E APPLICATION by procedure summons that the mortgagee might be at liberty to exercise any remedies available to him by way of appointment of a receiver of the mortgaged property. The facts are fully stated in the judgment.

F B. G. Burnett-Hall (for R. J. S. Thompson on war service) for the applicant.

G MORTON, J. : The mortgage here in question is a legal charge made by way of statutory mortgage dated Sept. 15, 1937, which was subsequently transferred to the present applicant. There was a joint and several covenant by the borrower and the surety with the mortgagee to pay on Mar. 15, 1938 (the mortgage being dated Sept. 15, 1937), the sum advanced, which was £425, with interest at the rate of £4 10s. per annum.

H By reason of the Law of Property Act, 1925, s. 117 (2), there is implied in this mortgage a covenant by the mortgagee with the person therein expressly charged to the effect following, *inter alia* :

That the mortgagor will, on the stated day, pay to the mortgagee the stated

mortgage money, with interest thereon in the meantime at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee (as well after as before any judgment is obtained under the mortgage) interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments the first thereof to be made at the end of 6 months from the day stated for payment of the mortgage money.

For reasons which will appear shortly, it is essential for the applicant A in the present case to show that certain interest was in arrear on July 16, 1940. Counsel informs me that the last payment of interest was on Mar. 15, 1939, so that the interest payable in Sept., 1939, and Mar., 1940, was unpaid on July 16, 1940.

On July 16, 1940, an order was made under the Defence (Evacuated B Areas) Regulations, 1940, declaring the part of the country in which the mortgaged property is situate to be an evacuation area.

I must now turn to the regulations to which I have just referred to see the effect of that order. Reg. 2 provides, *inter alia*, as follows :

... "evacuation area" means any area declared to be an evacuation area for C the purposes of these regulations ; "evacuation period" means (a) in relation to any unoccupied premises in an evacuation area [these premises were unoccupied at the date of the order], the period commencing with the date of the order declaring the area to be an evacuation area or the date on which the premises became unoccupied, whichever is the later, and ending with such day as may be appointed in relation to the area by an order of the Minister of Home Security . . .

Reg. 3 provides as follows :

(1) Where it appears to the Minister of Home Security that by reason of the D extent to which any part of a defence area has been or is likely to be evacuated these regulations ought to apply in relation thereto, he may declare that part of the defence area to be an evacuation area for the purposes of these regulations.

That is the sub-regulation under which the order was made. The E regulation continues as follows :

(2) Nothing in the Rules Publication Act, 1893, s. 3, shall apply to any order F made under this regulation ; but the Minister of Home Security shall cause notice of the effect of the order to be given as soon as may be in such manner as he thinks necessary for bringing it to the notice of the persons in the evacuation area and of any other persons who in his opinion ought to have notice of the order. (3) The Lord Chancellor shall take steps to supply courts with copies of the order authenticated in such manner as he may direct, and a court to which any such copy is supplied shall not require any further proof of the order.

In the present case, I have not actually seen the order in question, but the chief master has stated that such an order has been made, and G counsel for the applicant is content to accept that such an order was made on July 16, 1940. Reg. 4, so far as material, provides as follows :

(1) Subject to the following provisions of this regulation (a) no rent or rates H payable in respect of any premises in an evacuation area which are unoccupied at the date when the area is declared an evacuation area, or subsequently become unoccupied, and no sum secured or charged on any such premises . . . shall be recoverable during the evacuation period. . . .

In the present case, the principal sum secured by the mortgage and also the interest secured by the mortgage were clearly, in my view, sums secured or charged on the premises, and the result is that, subject to the provisions which I am about to read, the applicant could not recover

those sums during the evacuation period. The regulation then proceeds as follows :

... and no remedy arising in consequence of a default in the payment of any such rent, rates or sum as aforesaid shall be enforceable (whether by proceedings in any court or otherwise) during the evacuation period. . . .

- A That provision would prevent the applicants from succeeding on this application but for the proviso :

Provided that this paragraph shall not apply . . . (ii) to any such rent or sum as aforesaid which accrued due and payable before the commencement of the evacuation period . . .

- B Reg. 4 (2) provides as follows :

For the purposes of the proviso to the foregoing paragraph . . . (b) no part of any capital sum secured or charged as aforesaid and not payable or repayable by instalments shall be deemed to have accrued due and payable unless and until a written demand for payment has been served on the person liable and a period of 3 months, or such longer period as may have been specified in the demand, has elapsed since the service of the demand.

- C Counsel for the applicant bases his case simply on the fact that there were instalments of interest which accrued due and payable before the commencement of the evacuation period, and he says that, by reason of the proviso which I have already read, it is open to him to pursue
D his remedy in respect of the sums by way of interest which accrued due before the commencement of the evacuation period. I think that that contention is well-founded. Reg. 4 (2) (b) refers only to a capital sum, and I can find nothing in the regulations which would prevent the applicant in the present case from pursuing his remedy in respect
E of interest.

- In the present case, there appears to be no other reason for refusing the applicant the liberty for which he asks, and I propose to give the applicant liberty to proceed to exercise any remedies which may be available to him by way of appointment of a receiver of the property
F comprised in the legal charge. If the applicant does appoint a receiver, the appointment will have one curious result, so far as I can see, under the regulations, and that is that the receiver will only be at liberty to apply any moneys which may come to his hands in payment of the instalments of interest which fell due before the commencement of the
G evacuation period and have not yet been paid.

Solicitors : *Shelton, Cobb & Co.* (for the applicant).

[*Reported by* IRENE G. R. MOSES, *Barrister-at-Law.*]

MCMILLAN v. GUEST.

[COURT OF APPEAL (Sir Wilfrid Greene, M.R., Clauson and Goddard, L.JJ.), **November 20, 22, 25, 1940.**]

Income Tax—Director's remuneration—Director permanently resident abroad—Remuneration fixed by company's articles—Public office or employment—Remuneration liable to income tax—Income Tax Act, 1918 (c. 40), Sched. E, rr. 1, 6. A

The respondent was the director of a company incorporated under the Companies Act, 1929. The directorship and the whole of the government of the company were in England. The respondent was resident in the United States, and had so been for many years. At no material time was the respondent ever in England, but he devoted his time to furthering the interests of the company in North America. The respondent received remuneration as provided by the company's articles, and it was paid to him as a director without any reference to the particular tasks he performed in North America, in respect of which he received no additional remuneration. It was held by the general commissioners that the respondent was chargeable to income tax upon his remuneration as a director under the provisions of Sched. E, providing that tax shall be charged in respect of every public office or employment of profit:— B

HELD: (i) a director of a public company is the holder of a public office. C

(ii) the company of which the respondent was a director was an English company, and the duties upon him by law were to be exercised in England, and he was properly assessed to income tax under Sched. E. D

[EDITORIAL NOTE.] The importance of this case lies in the fact that it appears hitherto to have been the practice of the revenue not to tax income wholly earned and received abroad, and that the present case, therefore, marks a departure from that practice. Further, the previous cases were decided under Sched. D before the extension of Sched. E in 1927. The present case is, however, rather special in its facts, since the director received the remuneration here in question generally as a director, and not as remuneration for the special duties he was performing abroad. However, the position is one that quite commonly arises in companies with interests and branches outside the United Kingdom. For the purpose of giving a man greater influence with the local staff and the persons and companies with whom the company does business, such a representative of the company is made a director. This fact, it would seem, will make him liable to English income tax in respect of his director's fees. No doubt there are ways of arranging the representative's remuneration which will avoid the result in the present case. E

AS TO PUBLIC OFFICE OR EMPLOYMENT, see HALSBURY, Hailsham Edn., Vol. 17, pp. 217-220, paras. 439-443; and FOR CASES, see DIGEST, Vol. 28, p. 85, Nos. 484-489.] F

Cases referred to:

- (1) *Foulsham v. Pickles*, [1925] A.C. 458; 28 Digest 25, 131; 94 L.J.K.B. 418; 133 L.T. 5; 9 Tax Cas. 261.
- (2) *Bennett v. Marshall*, [1938] 1 K.B. 591; [1938] 1 All E.R. 93; Digest Supp.; 107 L.J.K.B. 319; 158 L.T. 75. H
- (3) *Barson v. Airey* (1925), 134 L.T. 586; 28 Digest 87, 500; 10 Tax Cas. 609.
- (4) *Robinson v. Corry, Corry v. Robinson*, [1934] 1 K.B. 240; Digest Supp.; 103 L.J.K.B. 228; 150 L.T. 250; 18 Tax Cas. 411.
- (5) *Proctor v. Ryall, Ryall v. Proctor* (1928), 14 Tax Cas. 204; Digest Supp.
- (6) *Pickles v. Foster*, [1913] 1 K.B. 174; 28 Digest 88, 516; 82 L.J.K.B. 121; 108 L.T. 106; 6 Tax Cas. 131.

- (7) *Great Western Ry. Co. v. Bater*, [1922] 2 A.C. 1; 28 Digest 85, 486; 91 L.J.K.B. 472; 127 L.T. 170; 8 Tax Cas. 231.
(8) *D'Arcy v. Tamar, Kit Hill & Callington Ry. Co.* (1867), L.R. 2 Exch. 158; 10 Digest 1152, 8150; 36 L.J.Ex. 37; 14 L.T. 626.
(9) *Watson v. Rowles* (1926), 95 L.J.K.B. 959; 28 Digest 87, 499; 135 L.T. 614; 11 Tax Cas. 171.

A APPEAL by the Inspector of Taxes from a judgment of LAWRENCE, J., dated June 14, 1940. The facts are fully set out in the judgment of SIR WILFRID GREENE, M.R.

B *The Attorney-General (Rt. Hon. Sir Donald Somervell, K.C.) and Reginald P. Hills* for the inspector of taxes.

J. Millard Tucker, K.C., and T. N. Donovan for the taxpayer.

C *Hills*: The first question is whether or not tax is chargeable on an income earned in the United Kingdom, irrespective of whether the person earning the income resides inside or outside the United Kingdom. If the office held by the respondent is an office inside the United Kingdom, the fact that he is not resident within the United Kingdom will not affect the matter at all. The House of Lords has held that the place of the employer or the paymaster is the deciding factor as to the locality of the place of the employment. The place where the functions are performed is not the essential element. Cases decided with regard to Sched. D are *Foulsham v. Pickles* (1) and *Bennett v. Marshall* (2). The same rule applies under Sched. E. The duties of a director of a company are limited. The respondent had no specific contract of employment, but it must not be assumed that he had no duties to perform. There are provisions of the Companies Act, 1929, which impose duties upon directors, and directors cannot avoid those duties by going abroad. Under Sched. E, the place where a person resides is not considered. The tax is payable in respect of all offices of profit within the United Kingdom. It is payable in respect of any office held under any company, whether the company be incorporated or unincorporated. The result of the change in the law made by the Finance Act, 1922, s. 18, is that all classes of offices are now included in Sched. E—namely, the original public offices and the whole of the non-public offices. In the present case, the director is not out of the United Kingdom by the terms of his employment as a director. He is in the same position as that of other directors. He is a director of the company in the ordinary sense of the term. He is an officer of a public company. There is no contract which requires him to live outside the United Kingdom. The special commissioners were right. [Counsel referred to *Pickles v. Foster* (6), *Barson v. Airey* (3) and *Proctor v. Ryall* (5).]

H *Tucker, K.C.*: The present case differs from the cases to which the attention of the court has been called. A person in the position of the director in the present case stands in a different position from that of people who are resident in the United Kingdom. A person is liable under Sched. D only if he performs his duties in the United Kingdom.

Without reference to any authority, it is difficult to see how an office can be exercised in the United Kingdom by a person who is all the time outside the United Kingdom. At no time of the year is the director in this country. At no time is he required to be here, and at no time does he perform any duties here. The only connection is that the company is incorporated here and carries on business here, and the payments are made from here. Before 1922, some employments fell within Sched. D and some fell within Sched. E. In 1922, in *Great Western Ry. Co. v. Bater* (7), the House of Lords decided that a railway clerk did not hold a public office or employment. It was afterwards provided that profits or gains accruing to a person from an office or employment should be chargeable under Sched. E (Finance Act, 1922, s. 18 (1)). If the court held that a directorship of an English company was not a public office or employment, it would be necessary for the Crown to satisfy the court that the director here was exercising an office or employment in the United Kingdom under Sched. E, r. 1 (a). If he is held not to be exercising any employment in the United Kingdom, he is not liable to be taxed in respect of this remuneration. A director can do nothing as a director except at a board meeting: *D'Arcy v. Tamar, Kit Hill & Callington Ry. Co.* (8). That case indicates the true nature of the office of a director. He is one of a body, and, to exercise his office, he must attend at a board meeting and exercise it there. In the present case, the appellant has been resident many years in America, and is now an American citizen. Copies of minutes and of balance sheets are sent to him in America. Unless, however, the receipt of those documents can be so regarded, the appellant takes no part in the management of the company in England. In order that a non-resident may be taxable, the office he has must be an office within the United Kingdom. The appellant performs other duties for the company. Those duties are performed by delegation under art. 108 of the company's articles. The place of exercising the office or employment governs the matter. [Counsel referred to *Pickles v. Foster* (6), *Proctor v. Ryall* (5), *Barson v. Airey* (3), *Robinson v. Corry* (4) and *Watson v. Rowles* (9).]

Donovan : The location of the office of director is not determined by the fact that a directorship is a creature of English law, or that a director has obligations under English law, or that his position is protected by English law. The true test is the country where the functions of the office are performed. Art. 30 of the old articles of association of *A. Wander, Ltd.*, deals with the disqualifications of directors. Condition 4 is the common form term that the office shall be vacated if a director absents himself from board meetings, except for illness. Art. 91 of the articles, however, which corresponds to art 30 of the old articles, contains no such condition. The condition was not included in the new articles because the company wanted *McMillan* as a director in Canada and in the United States. The dispute in the present case is whether the office is within or without the United Kingdom. The real

test as to that is to ascertain where the duties are performed. In the present case, the company wanted McMillan as a director, because he would carry greater weight with the Canadian managers if he were a director. [Counsel referred to *Corry v. Robinson* (4).]

Counsel for the appellant were not called upon in reply.

A

SIR WILFRID GREENE, M.R. : The respondent has for many years been a director of A. Wander, Ltd., and was a director of the predecessor of that company, which was reconstructed in 1923. The company is incorporated under the Companies Acts. Its directorship and the whole of its government are in this country. The respondent appealed to the general commissioners against assessments made upon him under the Income Tax Act, 1918, Sched. E, for the years 1937-38 and 1938-39 in respect of his office as a director of the company.

B

It appears that for many years the respondent has, in fact, resided in the United States of America, where he performed tasks on behalf of the old company and also for the new company since its formation. During the years of assessment, he was in the United States performing these tasks, which consisted of generally furthering the interests of the company in North America and the interests of a subsidiary company in which it was interested in the United States, of which he was, I think, the managing director. During the period in question covered by these assessments, he did not, in fact, take any part in the direction of the company in England. He resided the whole time in North America, where he performed the tasks to which I have referred. He attended no board meetings in England, and, speaking quite generally, he took no part at all in the direction of the company in England.

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The remuneration of the directors of the company is provided for by the articles, but the original arrangements with regard to remuneration, contained in art. 90, have been modified by an agreement between the company and its directors (including the present respondent), dated July 12, 1927. The articles had provided that the remuneration of the directors other than the managing directors should be an amount equal to 15 per cent. of the net profits in every year ascertained in the manner indicated. By this agreement, the divisible remuneration for the directors was reduced to 10 per cent. of the profits.

H

It is to be observed that the remuneration payable to the respondent under the articles, as modified by this agreement, is paid to him as a director without any reference to particular tasks which he may be performing in North America. The tasks which he is there performing are tasks which he does not perform under any obligation so to do. He could refuse to perform them. He could return to this country tomorrow. He could during the period of assessment have taken the part which he was entitled to take in the direction of this company in England. He had the right to attend the board meetings in England if he had been so disposed, and the work which he was doing in North

America was something entirely outside his duties as a director. He was under no contract to perform those tasks, and he received no remuneration for doing so.

It was suggested in argument that he could be regarded as having had delegated to him, under art. 108, the powers of the board. That article in common form provides as follows:

The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit.

No such delegation was in fact made, so far as appears from the stated case, beyond which, of course, we are not entitled to go with regard to matters of fact.

The position during the relevant period was, therefore, this. The respondent was a director of an English company which had its seat of government in England. During the period in question, he had all the rights of a director. He was subject also to all the liabilities of a director. His duties as director (by which I mean the duties which fall upon him by the general law and by the particular articles of this company) were, so to speak, in abeyance, for the reason that his fellow-directors had dispensed with his services in England, because, no doubt, they thought that he would do better work by remaining in the United States. Nevertheless, all his rights and duties as a director, if in fact they had been exercised, would have been exercised in this country, and nowhere else, and that circumstance, to my mind, is not affected by the fact that during this period he has been doing other work for the company voluntarily at the request of his fellow-directors and without payment. If the respondent's position with regard to the company which I have stated is borne in mind, I cannot myself find any real difficulty in construing the language of Sched. E as applied to those facts. It was held by the general commissioners that, during the years in question, the respondent was liable to assessment under Sched. E. That decision, of course, implies that, in their view, the respondent had or exercised a public office or employment of profit within the United Kingdom. That decision was reversed by LAWRENCE, J., and this appeal results.

Sched. E provides that tax under the schedule:

... shall be charged in respect of every public office or employment of profit. . . .

The necessity of the office having a public character appears in the schedule itself, and, of course, governs the remaining relevant provisions. Then, under r. 1, tax under the schedule is to be charged:

... on every person having or exercising an office or employment of profit mentioned in this schedule.

The list of public offices and employments of profit is to be found in r. 6. It is there for the first time that the reference to locality appears. Rule 6 provides as follows:

The tax shall be paid in respect of all public offices and employments of profit within the United Kingdom or by the officers hereinafter respectively described,

namely . . . (h) offices or employments of profit under any company or society, whether corporate or not corporate.

A I pause there to deal with one argument which was put forward by
counsel for the taxpayer—namely, that the holder of the office of
director in a company incorporated under the Companies Acts does not
hold a public office under a company within the meaning of that para-
graph. He asked what the element of publicity was, and how it should
be defined in order to come within the language of the paragraph. In
my opinion, it is too late to hold that the holder of the office of director
in a company incorporated under the Companies Acts is not the holder
B of a public office within the meaning of the rule. No doubt, when the
original Income Tax Acts were passed, the phrase “any company or
society, whether corporate or not corporate” embraced a very limited
number of companies or societies, because at that time the great
expansion of joint stock enterprise had not begun. Nevertheless, such
C companies as did exist, I venture to think, were unquestionably regarded
as companies the holding of office in which was the holding of a public
office. As time has gone on, the nature of companies incorporated under
the Companies Acts has changed, of course, and now under the same
Acts there are incorporated both companies of great importance, whose
D operations are a matter of public interest, and the most trivial com-
panies, which concern nobody but those directly interested in them.
Nevertheless, I am myself quite unable to think of any division of
companies incorporated under the Companies Acts which would confine
the phraseology of this rule in the way in which counsel for the taxpayer
E would have it confined. What the necessary element of publicity must
amount to in order to come within the language of the rule is a matter
which we are not called upon to define. It is really one of those cases,
I cannot help thinking, which must answer itself, and I am prepared to
hold, and to hold without hesitation, that the director of a company
F incorporated under the Companies Acts is the holder of a public office.
So much for that argument.

The next argument which is put forward on behalf of the respondent
is that the test of locality which should be applied for the purpose of
finding out whether or not an office is within the United Kingdom lies
G in the question: “Where are the functions of the office performed?”
It is said that in the present case all the functions of the office are per-
formed by the respondent outside the United Kingdom. It is important
to bear in mind, in relation to that argument, the real nature of the
office of a director. The word “office” is not infrequently used as a
H synonym for “employment,” but the office of director is something
quite different from the employment of an agent, or even the employ-
ment of a Crown servant. Under a contract of mere employment, the
tasks to be performed by the employee are, of course, to be performed
in the place which the contract indicates, and, if a person is employed
as agent abroad of an English company, his task is to perform the duties

of that agency abroad, and I can well see why, in a case of that kind, it would not be possible to say that an agent held an office within the United Kingdom. He would fall to be assessed, if he were assessable at all, under Sched. D, and not under Sched. E—that is, before the Act was amended. In the case of a director, however, the position appears to me to be entirely different. What I am saying deals only with this particular company, and I have no intention of expressing any opinion as to what might happen in the case of a director of an English company whose seat of government was in a foreign country. In such a case, there may be an argument for saying that different considerations apply. I say nothing about it, because it is not relevant to the consideration of the present problem. In the case of a company situated and governed as this company is, however, it is to be remembered (and this appears to me to be the crucial matter) that every right which a director has, and every duty which the law, general or special, imposes on the director, is to be exercised in this country, and nowhere else. As a test of that, in the matter of the director's rights, it must be remembered that a director is entitled to ask the assistance of the courts of this country to enable him to exercise those rights. If he is excluded from the boardroom by his fellow-directors, he is entitled to obtain the assistance of the courts here to secure entrance for him. That brings out one of the differences between the case of a director of a company and the case of a person who is merely employed by a company. Such a person has no such specific rights which will be specifically safeguarded by the courts. If he is excluded from the job for which he is employed, his remedy is a remedy in damages. A director, on the other hand, has a definite specific right, which is entitled to protection.

In the case of an ordinary director, who does, in point of fact, perform the duties of a director in this country, it cannot be questioned, of course, that Sched. E applies to him. The problem is to ascertain, on the facts of this case, the true test of the locality of the office. We have here, on the one hand, functions performed in the United States and in Canada which are outside the normal duties of a director. We have the normal duties of a director, exercisable, if he were minded to exercise them, in England, and nowhere else. We have the normal rights of a director, enforceable, if he were minded to enforce them, in England, and nowhere else. It appears to me that the office is tied to this country by reason of those circumstances, and the fact that during any given period an individual director is not performing those duties or exercising those rights does not sever that tie. Take the case of a director who takes no part whatsoever in the company's affairs, and does no work for it, and neither performs the duties nor exercises the rights of a director, but chooses to live abroad. Let me assume that the articles of his company, like the articles of the present company, do not put him under compulsory retirement if he fails to attend board meetings. In such a case, it could not be suggested, it appears to me, that such a director

would not be properly described as the holder of a public office within the United Kingdom, or as a person having a public office in the United Kingdom. If he has not an office in the United Kingdom, where has he one? It seems to me that in such a case the applicability of Sched. E is beyond question.

- A The present case is a variant of that. It is precisely on all fours with the facts I have suggested in the assumed case, with the added circumstance that the director in question is voluntarily and without remuneration doing work for the company in the United States. Does that super-added fact really alter the position? In my opinion, it does
- B not. It seems to me that the basic fact remains that the office *qua* office, and considered as a complex of rights and duties, is a thing which is tied to, and bound up with, the locality of the company itself. These added voluntary functions are something outside the basic duties and rights of the office, and the fact that they have been added to those
- C basic rights and duties which still remain does not operate to disassociate the office of this director from the company in England. Those appear to me to be the real conclusive arguments which displace the claim of the respondent in this case.
- D Numerous authorities were referred to. I do not find any real assistance from them, but there are one or two to which I must refer. Counsel for the Crown referred to two cases, *Foulsham v. Pickles* (1) and *Bennett v. Marshall* (2), which were decided in reference to the language of Sched. D, which is different from the language of Sched. E. I do not find that those cases really assist me in the decision of the present question.
- E However, there were cases referred to by counsel for the taxpayer with regard to which I must say a word. The earliest of those was *Barson v. Airey* (3), where the chairman of the board of a British company earned certain additional remuneration in respect of services performed by him for the company when on visits to China. The only argument
- F in that case was that the additional remuneration which he received in respect of those services could be disassociated from his office of director. The general commissioners found as a fact that that additional remuneration was paid to him as chairman of the company for services rendered by him as a director. When the matter came before the court,
- G the only question was whether or not there was evidence to support that finding. It does not appear to me that there is anything in that case which bears on the present question. The taxpayer there was chairman of directors, and he performed the normal duties of a director in this country during the period of assessment in question, save for the
- H fact that during part of the period he was away in China. Therefore, he was unquestionably having or exercising the office of director in this country, and, once the decision was reached, and once it was accepted, as it was accepted in that case, that the extra remuneration earned by what he did in China was payable to him in his capacity as director, the whole of his emoluments as director were caught by Sched. E. In

other words, one cannot split up an office under Sched. E and refer part of the remuneration paid for it to what is done in England and part to what is done abroad. Provided it is an office within the United Kingdom, then any additional remuneration for work done abroad is caught by the schedule. It appears to me that there is nothing in that case which assists in the decision of the present case. A

The next case to which I shall refer (it is not in order of sequence, because I reserve for the last the case which more directly affects the present decision) is *Robinson v. Corry* (4). That was the case of an established Civil Servant who held the position of deputy cashier in His Majesty's naval base at Singapore, and the question arose as to his salary and certain allowances. The taxpayer there, of course, was a person whose entire functions and duties had to be exercised in Singapore. He was not in the least in a position similar to that of a director of a company, but he was merely an employee of the Crown employed in Singapore for the purpose only of performing duties in Singapore. It is true that his position is referred to as an office, but in truth and in fact it was merely an ordinary employment under the Crown. In other words, the only element of locality in the case except the actual situation of the employer, the Crown, was in Singapore, and it is difficult to see in such a case, if it had not been for certain special language in the rules, why the office, if it were regarded as an office, should not be held to be located outside the United Kingdom. In that particular case, however, that conclusion could not be reached, because of the special language of Sched. E, r. 18, which makes special provision for employees of the Crown or holders of offices under the Crown. Rule 18 provides as follows: B C D E

(1) The tax shall be assessed and charged by the respective commissioners for all the offices in each department, in the place where the said commissioners execute their offices, although certain of the offices in the same department may be executed elsewhere. (2) A person chargeable in respect of an office or employment of profit shall be deemed to exercise it at the head office of the department under which it is held, and shall be assessed and charged at that head office, although the duties of the office or employment are performed, or any profits thereof are payable elsewhere, whether within the United Kingdom or not. F

The taxpayer in *Robinson v. Corry* (4) came exactly within subrule (2). He was the holder of an office, or, as I should have preferred to put it, he was employed under a government department, and the rule provides that such persons are to be deemed to exercise the office or employment at the head office of the department. Accordingly, it was held that he was assessable under Sched. E in respect of the entirety of his remuneration. G

In passing, I should say that in the present appeal an argument was based on that subrule, because it was said that the reference to the exercise of the duties of the persons there referred to as being possibly outside the United Kingdom indicated that throughout the schedule the true test of the locality of the office is the place where its functions are performed. The argument, in my opinion, fails to apply to the present H

case, for the reason, which I have already given, that the functions and duties fall to be performed in this country, and nothing could alter that circumstance, and the fact that certain extra things were done abroad cannot possibly alter it.

A The next and last case to which I must refer is *Proctor v. Ryall* (5), a decision of ROWLATT, J., in the case of a foreign director of a British company. That director was responsible for the whole of the British company's Continental business, but his only remuneration was a fixed salary paid by the company plus commission on the company's profits from trading on the Continent. He lived in Paris with his family,
B but he came to London once a month to attend the company's meetings, and he was assessed under Sched. E. It was held by the special commissioners and by ROWLATT, J., that the office was an office within the United Kingdom, and I should have thought that there was no real difficulty in coming to that decision on any view, because he was actually
C attending board meetings. However, ROWLATT, J., made some observations, which I approach, as I always do approach the observations of that learned judge on income tax matters, with very great respect, and those observations are to be found at p. 214 :

D The question then arises : What is the locality of an office, which is an abstraction ? In the Act of 1918 the words are "having or exercising." It seems to me that the place of an office is where the officer "has" or "exercises" it. Sched. E, r. 18 (2), although, as I shall explain, I do not think it directly affects this case, indicates by its language (which goes back to sect. 181 of the Act of 1803) that the place of exercise governs. And HORRIDGE, J., obviously thought that was the test when he decided *Pickles v. Foster* (6). But where does the officer exercise his office ? In the case of a sinecure I should imagine he would exercise it at the seat
E of the body under which he holds it. In ordinary cases I will assume that *prima facie* the place of his duties would be the main consideration, but, no doubt, the legal nature of the post would require a close examination to see whether it could be said to have a local existence anywhere else. When the section dealing with the assessment of offices in towns corporate and counties, which I shall have to refer to in a moment, is looked at, it will be seen that offices in companies are to be assessed where the company is, which also, I think, supports the view I have
F endeavoured to express. I do not think it is safe to say that an office must necessarily be situated at the home of the company in which it is held.

Then he refers to *Pickles v. Foster* (6) and *Foulsham v. Pickles* (1), and he deals with the facts of the case before him. Then he continues as follows :

G I am bound to say I think I must hold that his office is situate within the United Kingdom. He is a director of this company and he comes here, and he sits, not as an assessor or as a person called in ; he sits, no doubt, as a director under the articles, and I think he was bound to sit. As I have already explained, I can only come to the conclusion that, although it is an exceptional case, and very technical—and, I think, very hard—it cannot be said that his office is not an
H office in the United Kingdom.

The judge there is considering the place where the functions were performed, and he lays particular stress on the fact that the director there did in fact perform functions in England by attending board meetings. However, if he intended to express the general proposition that a director of a company, whose rights and duties, as far as this

country is concerned, remain, so to speak, dormant while he does something special abroad, is to be taken as holding an office outside the United Kingdom on the ground that the only functions he performs are those special functions abroad, then, with great respect, I cannot take that view. My reasons for declining to take that view sufficiently appear from what I have said in the earlier part of this judgment. In the result, in my view, the appeal should succeed. A

CLAUSON, L.J. : I agree. I am satisfied, for the reasons given by SIR WILFRID GREENE, M.R., that LAWRENCE, J., was wrong in reversing the judgment of the commissioners, and that the commissioners came to a right conclusion. B

GODDARD, L.J. : I agree.

Appeal allowed with costs. Leave to appeal to the House of Lords

Solicitors : *Solicitor of Inland Revenue* (for the Inspector of Taxes) ; C
Goulden, Mesquita & Co. (for the taxpayer).

[Reported by W. K. SCRIVENER, Esq., *Barrister-at-Law*]

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LYUS v. STEPNEY BOROUGH COUNCIL.

[COURT OF APPEAL (Scott, MacKinnon and Luxmoore, L.JJ.),
November 11, 12, December 3, 1940.]

Emergency Legislation—Duty to light streets—Sand-bin on pavement—Lighting restrictions—How far affecting obligation to light obstructions in street—Metropolis Management Act, 1855 (c. 120), s. 130—London County Council (General Powers) Act, 1928 (c. lxxvii), s. 33—Lighting (Restrictions) Order, 1939 (S.R. & O., 1939, No. 1098), para. 1.

Highways—Obstructions—Sand-bin on pavement—Suspension of statutory duty to light streets—Common law duty to persons using highway.

The plaintiff, while walking home during the black-out on Sept. 15, 1939, collided with a sand-bin which had been lawfully placed on the pavement by the defendant council under the authority of the London County Council (General Powers) Act, 1928, s. 33. This section also provides that the council must do nothing to hinder the reasonable use of the street by the public. On account of the Lighting (Restrictions) Order, 1939, there were no lights in the street, and the sand-bin was invisible to the plaintiff proceeding without negligence. Obstructions in more important streets of the borough had either been lighted or painted white, but, up to the time of the accident, nothing had been done with regard to the street in which the sand-bin was placed (which was a subsidiary street) or the sand-bin:—

HELD: (i) the question whether the erection of the sand-bin hindered the reasonable user of the street was one to be determined at the time of its erection, and, as at that time it was not such a hindrance, it did not become so later. After its erection the council had a statutory power to maintain the bin, but that did not involve any active step by the council. The council, therefore, were not liable to the plaintiff in damages.

(ii) Assuming it was under a duty to do so, the council were not negligent in not painting this obstruction, since only 15 days had elapsed after the necessity to do so arose, and the council were entitled to deal with the main streets first.

Observations on the provision of transcripts and correspondence not used in the appeal.

Decision of HUMPHREYS, J. ([1940] 4 All E.R. 75) reversed.

[EDITORIAL NOTE. In the court below HUMPHREYS, J., held that, although local authorities may be under no statutory duty to light obstructions in the streets, they may yet be under a common law duty to take reasonable precautions to prevent danger to persons using the highway. Quite apart from lighting obstructions, it is possible to render them more easily seen by painting them white. The Court of Appeal, however, have reversed this decision and have held that, if an erection in the highway is not a nuisance, in the sense of being a hindrance to the reasonable user of the street, at the time of its erection, it does not become a hindrance to such user at some later time. This decision is supported by the opinions given in *Great Central Ry. Co. v. Hewlett* (5). It would appear that the danger arises not from erecting the obstruction or keeping it there, but from the combination of its being there and the restriction upon street lighting imposed during a time of war. There is, therefore, no breach of statutory duty for which a local authority can be liable. However, the argument which found favour with HUMPHREYS, J., that, when restrictions on lighting made obstructions in the highway, which were quite innocuous before, a potential source of danger to persons using the highway, the council were under a common law duty either to light or paint them will commend itself to most people, if only for the reason that practically every such authority, immediately upon the restrictions on lighting coming into force, proceeded to deal with the matter in one of those ways. Now that it is

settled that there is no such common law duty, it would seem that it should be made a statutory duty, but that is a matter for the legislature.

AS TO INDICATING OBSTRUCTIONS IN HIGHWAY, see HALSBURY, Hailsham Edn., Vol. 16, pp. 323, 324, para. 436; and FOR CASES, see DIGEST, Vol. 26, pp. 392-395, Nos. 1187-1212.]

Cases referred to :

- (1) *Greenwood v. Central Service Co., Ltd. (St. Marylebone Borough Council, Third Party)*, [1940] 2 K.B. 447; [1940] 3 All E.R. 389; Digest Supp.
- (2) *Wodehouse v. Levy (St. Marylebone Borough Council, Third Party)*, [1940] 2 K.B. 561; [1940] 4 All E.R. 14; Digest Supp.; *revsg.*, [1940] 3 All E.R. 137.
- (3) *Morrison v. Sheffield Corpn.*, [1917] 2 K.B. 866; 38 Digest 16, 89; 86 L.J.K.B. 1456; 117 L.T. 520.
- (4) *Baldock v. Westminster City Council* (1918), 88 L.J.K.B. 502; 26 Digest 392, 1190; 120 L.T. 470.
- (5) *Great Central Ry. Co. v. Hewlett*, [1916] 2 A.C. 511; 38 Digest 16, 88; 85 L.J.K.B. 1705; 115 L.T. 349; *revsg.*, 114 L.T. 713.
- (6) *Manley v. St. Helens Canal & Railway Co.* (1858), 2 H. & N. 840; 38 Digest 41, 245; 27 L.J.Ex. 159.
- (7) *Sheppard v. Glossop Corpn.*, [1921] 3 K.B. 132; 38 Digest 34, 207; 90 L.J.K.B. 994; 125 L.T. 520.
- (8) *Polkinghorn v. Lambeth Borough Council*, [1938] 1 All E.R. 339; Digest Supp.; 158 L.T. 127.
- (9) *Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430; 38 Digest 25, 137.
- (10) *Kent and Porter v. East Suffolk Rivers Catchment Board*, [1939] 2 All E.R. 207; Digest Supp.; *affd.*, [1939] 4 All E.R. 174; 161 L.T. 341.

APPEAL by the defendants from a judgment of HUMPHREYS, J., dated Aug. 19, 1940, and reported [1940] 4 All E.R. 75. The facts are fully set out in the judgment of the court delivered by LUXMOORE, L.J.

Cecil R. Havers, K.C., and *Harry Samuels* for the appellants.

Gilbert H. Beyfus, K.C., and *E. T. Rhymer* for the respondent.

Havers, K.C. : The judge was wrong in holding that the council was liable to do anything at all. If it were a question of negligence, none was proved. The accident happened only 12 days after war was declared. The council had begun to make the necessary arrangements on Aug. 18. It actually started on the more important streets, and it had not had time to reach the street in question. The judge was wrong in finding the council guilty of negligence. [Counsel referred to *Wodehouse v. Levy (St. Marylebone Borough Council, Third Party)* (2), *Greenwood v. Central Service Co., Ltd. (St. Marylebone Borough Council, Third Party)* (1), *Morrison v. Sheffield Corpn.* (3), *Great Central Ry. Co. v. Hewlett* (5), *Baldock v. Westminster City Council* (4), *Sheppard v. Glossop Corp.* (7) and *Polkinghorn v. Lambeth Borough Council* (8).]

Beyfus, K.C. : This case is not covered by *Wodehouse's* case (2). The question of lighting is not the only matter relied on by the respondent. The council was under a duty to see that, in spite of the blackout, the obstruction was as little dangerous as possible to the public. The plea of nuisance was introduced in the course of the hearing only as an

amendment by leave of the judge. The erection interfered with the reasonable use by the public of the highway. *Wodehouse's* case (2) has no bearing on the question of nuisance. On the introduction of the lighting restrictions, the obstruction became a nuisance, in the altered circumstances. The council, having undertaken the task of whitening the obstructions, should have done so effectively. [Counsel referred to *Geddis v. Bann Reservoir Proprietors* (9) and *Kent and Porter v. East Suffolk Rivers Catchment Board* (10).]

LUXMOORE, L.J. [delivering the judgment of the court]: On or about Aug. 24, 1936, the Stepney Borough Council (hereinafter called the council) caused a sand-bin to be erected on the pavement in Settles Street, Stepney. It was erected under the powers conferred on the council by the London County Council (General Powers) Act, 1928, s. 33, which provides as follows :

(1) A borough council may provide and maintain in upon or under any street vested in or repairable by them orderly bins or other receptacles for the collection and temporary deposit of street refuse and waste paper and the storage of sand grit shingle or cinders of such dimensions and in such positions as the borough council after consultation with the Commissioner of Police of the metropolis may from time to time determine. (2) Nothing in this section shall empower a borough council to hinder the reasonable use of a street by the public or any person entitled to use the same and a borough council shall not exercise their powers under this section in such a way as to create a nuisance to any adjacent owner or occupier.

There is nothing in this section which requires that anything provided or maintained under its powers shall be lighted or distinguished in any particular manner or at all, but the council was required by the Metropolis Management Act, 1855, s. 130, well and sufficiently to light the streets in the area under its jurisdiction.

It is common ground that the Commissioner of Police was consulted with regard to the erection of the sand-bin, and that he approved its dimensions and the site upon which it was erected. Until after the accident to which reference is made later, no question was raised on the ground that the sand-bin hindered the reasonable use of Settles Street by the public or any person entitled to use it, or that the presence of the sand-bin on the pavement created a nuisance to any adjacent owner or occupier.

On Sept. 1, 1939, more than three years after the sand-bin was erected, the Lighting (Restrictions) Order, 1939, was made by the Secretary of State for the Home Department under the Defence Regulations, 1939. So far as is material, para. 1 of that order provides as follows :

Subject as hereinafter provided, no person shall during the hours of darkness cause or permit [any light to be displayed].

Para. 4 provides as follows :

Para. 1 of this order shall not apply to the following lights for the guidance of traffic in roads . . . (d) lamps indicating obstructions upon or near the carriage-way of any road, provided that they are of candlepower not exceeding one and so screened as to prevent light being thrown upwards and any appreciable glow being produced on the road surface.

As the result of this order, the lighting of streets by lamps in the borough of Stepney under the Metropolis Management Act, 1855, s. 130, was prohibited, and was discontinued by the council as from Sept. 1, 1939.

On Sept. 15, 1939, the plaintiff was on his way home at 9 p.m. when he collided with the sand-bin and sustained serious injuries. It is agreed that the night of Sept. 15 was very dark. On Mar. 7, 1940, the plaintiff issued a writ against the council in the King's Bench Division claiming damages for negligence and for breach of statutory duty. The negligence alleged against the council was (a) the failure to light or keep lighted the sand-bin, or to take any steps or precautions to prevent persons lawfully using the footway in Settles Street from colliding with the sand-bin, or to notify them of the existence or position of the sand-bin on the footway, and (b) the failure to place a red lamp or other warning on or about the sand-bin, or to mark the same in any way with whitewash or otherwise, or to place a watchman thereabout. The plaintiff also alleged that the council placed and maintained upon the footway an obstruction which was a nuisance to persons lawfully using the footway at night unless lighted or its existence was otherwise notified. The council denied that it was guilty of negligence in the maintenance of the sand-bin, and pleaded that it was under no obligation to keep the sand-bin lighted or to place a red lamp thereon or to provide a watchman therefor. The council further denied that the sand-bin was a nuisance.

The action was tried by HUMPHREYS, J., without a jury on Aug. 19, 1940. At an early stage of the hearing, the judge permitted the council to amend its defence by pleading as follows :

The sand-bin was erected by the council under the powers conferred on it by the London County Council (General Powers) Act, 1928, s. 33, which powers were duly conformed to and exercised by it and the council was under no legal duty or obligation by the terms of the statute or otherwise to illuminate or paint or white-wash the sand-bin but was entitled to maintain it without any light thereon pursuant to the terms of the statute and without placing a watchman thereabout or otherwise giving warning of its presence.

The judge held that, although, in the circumstances, the council was absolved from the statutory duty of lighting the streets in the borough of Stepney imposed on it by the Metropolis Management Act, 1855, s. 130, that fact did not absolve it from any other duty which the common law might impose upon it to see that persons walking about the street were not unduly inconvenienced, or that accidents were not caused to them, by any carelessness on its part.

The evidence before the judge established that, on or about Aug. 18, 1939, in compliance with a memorandum from the Home Secretary, the council began to take steps to paint with white marks the various obstructions, including sand-bins, placed in the streets of the borough, in order to prevent persons using the streets in the dark from injuring themselves by colliding therewith. The council started by painting the obstructions in the more important thoroughfares, and it had not reached

Settles Street, which is admittedly not one of these thoroughfares, by Sept. 15, 1939. The judge held that the council was guilty of negligence in not taking steps between Aug. 18, 1939, and Sept. 15, 1939, to call attention to the existence of the sand-bin in question by putting a splash of white paint upon it. Having held that the council was
A negligent, and, therefore, liable to the plaintiff in damages for the accident which he suffered, HUMPHREYS, J., fixed the damages at £190, and gave judgment for the plaintiff for that sum and costs.

The council has appealed to this court, and asks that the judgment of HUMPHREYS, J., may be set aside, that judgment in the action may
B be entered for the council, and that the plaintiff may be ordered to pay the council's costs of the action. The appeal admittedly is not directed to the quantum of damage, but is confined to the question of the liability of the council in law. The council contends that, as it was prohibited from lighting the streets within the borough under the provisions of the
C Metropolis Management Act, 1855, s. 130, there was no duty on it to warn the plaintiff or any other person using Settles Street of the existence of the sand-bin or of its position, because it had been erected by the council with all reasonable care under the provisions of the London County Council (General Powers) Act, 1928, s. 33, and that the council
D was entitled to maintain it in the position in which it had been erected under the express power to maintain conferred by the same section. The council further contended that the sand-bin was not a nuisance, and that it was under no duty, and had not, therefore, been guilty of negligence in failing to paint it or take other steps to warn the plaintiff
E of its existence and position.

As already stated, HUMPHREYS, J., held that the sand-bin was placed in Settles Street in accordance with the provisions of the appropriate statute, and that its existence was not a nuisance, but he went on to hold that the statute did not absolve the council from the obligation of
F using reasonable care to see that what was an obstruction, although a lawful obstruction, did not cause injury to the public, who have the primary right of using Settles Street for the purpose of passing along it without hindrance. The first question to be considered is whether the council was under any such obligation. The question has been frequently
G considered, and numerous cases were cited to the judge. He expressed the opinion that the decisions were in conflict, and, in the result, refused to follow a number of them, including two recent decisions of this court—namely, *Greenwood v. Central Service Co., Ltd. (St. Marylebone Borough Council, Third Party)* (1) and *Wodehouse v. Levy (St. Marylebone Borough Council, Third Party)* (2). The judge purported to base his judgment on
H an earlier decision of this court in *Morrison v. Sheffield Corpn.* (3), which was not cited either in *Greenwood's* case (1) or in *Wodehouse's* case (2). Both in *Greenwood's* case (1) and in *Wodehouse's* case (2), the local authority had erected an obstruction in the highway under the express powers conferred on it by the Metropolis Management Act,

1855, s. 108. No special duty was imposed by that statute to light either obstruction, but by sect. 130 a general duty was imposed on the local authority to cause the streets within the district to be well and sufficiently lighted. This, as was pointed out by BANKES, L.J., in *Baldock v. Westminster City Council* (4), included a duty to provide sufficient light to indicate the position of any obstruction which the local authority placed in the street under the powers conferred by sect. 108. A

It is true that sect. 108 does not contain any such provision as is to be found in the London County Council (General Powers) Act, 1928, s. 33 (2), to which reference has already been made, but we do not think that the presence of such a provision in the latter Act can affect the position of the council. It affords nothing more than a warning that, in exercising the power of placing in a thoroughfare that which must of necessity be an obstruction, the user of the thoroughfare as such is not to be unreasonably interfered with, nor shall a private nuisance be created. In our judgment, the question whether the erection of the sand-bin would hinder the reasonable user of the street by the public or any other person was one to be considered at the time when the sand-bin was erected, and, if at that time there was no such hindrance, it is difficult to see how at some later date it could be said that the sand-bin had become a hindrance to the user of the street. In our judgment, the existence of sect. 33 (2) does not afford any ground for distinguishing the present case from the decisions in *Greenwood's* case (1) and *Wodehouse's* case (2), respectively. Unless it can be shown that the two last-mentioned cases are in conflict with some other decisions of this court or of the House of Lords, we think that we are bound to follow those cases. B C D E

However, HUMPHREYS, J., thought that *Greenwood's* case (1) and *Wodehouse's* case (2) were in conflict with the decision in *Morrison's* case (3). The question is whether he was right in so thinking. In his judgment, he referred to the following sentence in the opinion of LORD PARKER OF WADDINGTON in *Great Central Ry. Co. v. Hewlett* (5), at p. 519 : F

... it is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered. G

It appears that HUMPHREYS, J., thought that, although, when the sand-bin was erected in 1936, there was no reasonable or foreseen prospect of danger, yet the council would be liable to take some further steps at some subsequent date to provide for what might happen if the existing circumstances should thereafter change. It seems to us that the judge has failed to appreciate that the council, in providing the sand-bin in the first instance, was exercising a different power from that which it exercised after its erection had been completed. The first power exercised was to provide the sand-bin, while the second was to H

maintain it. The difference between these two powers is manifest from a perusal of the respective opinions of LORD PARKER OF WADDINGTON and LORD WRENBURY in *Great Central Ry. Co. v. Hewlett* (5).

- Before I deal with that case, it is important to bear in mind its material facts. In 1901, the Great Central Ry. Co. had erected in the
- A public highway certain gate posts from which collapsible steel gates could be run across the road so as to close the entrance to a station yard belonging to the company. The posts were erected by the railway company in contravention of their special Act, and were held by the court to be an obstruction to the highway. In 1902, the railway com-
- B pany obtained an Act which empowered them to maintain the posts and gates and to replace them when necessary on the same site. On a dark night in 1917, while a taxicab driver was lawfully driving his taxicab along the public highway into the station yard, he collided with one of the posts, which was practically invisible, owing to the darkening
- C of the street in compliance with the Reduction of Lighting Regulations then in force. The taxicab driver sued the railway company for damages for negligence, and failed. LORD PARKER OF WADDINGTON pointed out that, in considering whether or not the company had been negligent, it was necessary to consider the nature of the statutory power which
- D was being exercised by the company, and that the only power which could be considered was the power to "maintain." He asked the meaning of the word "maintain" as used in the Great Central Railway Act, 1902, s. 31, and answered the question by saying, at pp. 519, 520 :

- Negatively it relieves the company from any obligation which might otherwise have existed to remove the posts. Positively it enables the company to do what is necessary to keep the posts there. It is only in its negative aspect that the company can be said to have been exercising this power. It has, in fact, done nothing at all. Is the principle relied on really applicable under these circumstances? In my opinion it is not. It seems to me that for its application the company must be doing something involving risk to others without taking reasonable precautions to obviate such risk. Here the risk arises, not from what the company is doing, but from the existence of the gate posts legalised by the Act
- F coupled with the diminution of light necessitated by the exigencies of the war. It is reasonably certain that the legislature was, under the circumstances which prevailed when the Act was passed, satisfied that there was no appreciable risk to the public; otherwise the legalisation of the obstruction without expressly providing precautions to obviate the risk would be inexplicable. The change of circumstances cannot be relevant on any question of construction, and in my opinion the Act does not impose on the company any such obligation as suggested by the respondents, nor can any such obligation be based on the principle relied on.

- G Then LORD WRENBURY said, at p. 524 :

- In the year 1902 the appellants obtained an Act which authorised them to maintain the post and from time to time when necessary to renew and replace it in the same site and position. The authority was not an authority to do anything actively (except as regards renewal and replacement, upon which nothing turns), but a mere authority to leave things alone. The word "maintain" in the section means no more than "not remove." The result is that that which theretofore was an illegal obstruction became a legal obstruction. For greater accuracy the word "obstruction" (which implies something which improperly interferes with the rights in the highway) ought to be dropped. The post was no longer an obstruction to the highway. The legal highway was a road in which there stood a post. Whoever used the highway must use it as a highway with a post in it.
- H

Later, LORD WRENBURY said, at p. 525 :

No one disputes the general proposition that a person who is clothed with a

statutory power to do an act must in doing it exercise reasonable care to prevent injury to others. But in the present case the statutory authority was not to do an act but to leave things as they were. In 1902 the post was in the highway illegally. The statute of 1902 said you may leave it where it is. It thus became a post in the highway legally. The authority was not an authority to be active, but to be passive. The Act merely released an obligation, namely, the obligation not to obstruct the highway. From that state of facts no duty flows. If there be duty or authority to do an act it is possible to be negligent in doing it. If there be duty or authority to do or abstain from doing an act according to circumstances it is possible to be negligent in doing or abstaining from doing it. But if the duty or authority be simply not to do an act—merely to leave things as they are—it is impossible to be negligent in not doing anything. The last is the present case. It is said, however, that “maintain” is not merely passive, but implies also something active, namely, doing acts of maintenance. This may be true, but it is not necessary to inquire whether it is or not. For the words of the statute, “renew and replace,” plainly authorise affirmatively such act to be done. I agree that in acts of renewal or replacement the appellants might be guilty of negligence. But they have done no such acts. Their only act has been to leave the post as it was.

Let me apply the passages to which reference has been made to the present case. Here the sand-bin was provided by the council. It cannot be suggested that there was anything unreasonable in its dimensions when it was provided in 1936, or that it hindered any person in the use of the thoroughfare, or that it constituted a private nuisance to any adjacent owner or occupier. Indeed, as already stated, the judge has held to the contrary. After it had been erected, it became an authorised obstruction of Settles Street, and one which the council was empowered to maintain. The power to maintain is distinct and separate from the power to provide, and, as pointed out by LORD PARKER OF WADDINGTON and LORD WRENBURY in *Great Central Ry. Co. v. Hewlett* (5), does not involve any active operation on the part of the council. The Act itself does not impose any liability to light an obstruction lawfully provided, and there is nothing in the Act out of which such a duty can be spelt.

Of course, if the sand-bin provided were not in accordance with the requirements of the Act—for example, if it were furnished with a number of spikes projecting over the thoroughfare—the case would be different, for the sand-bin provided would not be a reasonable sand-bin, and consequently would not be within the Act, and accordingly there would be no statutory power to maintain it. An example of this class of case is to be found in *Manley v. St. Helens Canal & Railway Co.* (6), where the power was to make and maintain a sufficient swivel bridge over a canal. The plaintiff recovered damages for injuries caused by falling through a gap in the highway over the swivel bridge caused by opening it for traffic. As LORD PARKER OF WADDINGTON, when commenting on *Manley's* case (6), pointed out in *Great Central Ry. Co. v. Hewlett* (5), at p. 521 :

It [the swivel bridge] was not a work expressly authorised or sanctioned by the legislature. The case cannot be used as an authority for the proposition that a mere power to maintain what the legislature has expressly sanctioned involved any obligation towards the public.

In our opinion it is on the same basis that the decision in *Morrison v. Sheffield Corpn.* (3) can properly be distinguished from *Greenwood's*

case (1) and *Wodehouse's* case (2). The facts in *Morrison's* case (3) were these. A local authority, purporting to act in pursuance of the powers conferred on it by the Public Health Acts Amendment Act, 1890, s. 43, planted trees in certain of the highways in the area under its jurisdiction, and surrounded each tree with a spiked iron guard. After the guards had been erected, an order was promulgated under the Defence of the Realm Regulations by which all street lights in the area were ordered to be extinguished at a certain hour. The plaintiff, who was crossing one of the streets where the trees had been planted on a dark night after the prescribed hour, and when the lights had been extinguished, came in contact with one of the spiked guards and was seriously injured by the spike. He sued for damages in an action tried by ROWLATT, J., with a jury, and the jury found in his favour and gave a verdict for a substantial sum by way of damages. The corporation appealed, but the Court of Appeal upheld the decision in favour of the plaintiff. We agree that it is not easy to understand some passages in the various judgments, especially that in which VISCOUNT READING, L.C.J., after referring to *Great Central Ry. Co. v. Hewlett* (5), at p. 871, stated that the general principle of law laid down in that case was not in controversy, and added that the degree of care required from the council was not exhausted by erecting the guards so as to be reasonably safe for the protection of the public at the time of their erection, and that the duty continued so to keep them as not to be dangerous to the public using the highway. This passage is easily explained if it is based on the fact that the guards with spikes, which were reasonably safe while street lighting was maintained, were not, by reason of the existence of the spikes, guards authorised by the statute. That the guards with spikes were not so authorised was, we think, recognised by SCRUTTON, L.J., who was a party to the decision in *Morrison's* case (3), in a later case, *Sheppard v. Glossop Corpn.* (7), at p. 148 :

Morrison v. Sheffield Corpn. (3) is another case of creating a danger in a highway. The corporation with a view to improving the amenities of Sheffield planted trees in the streets. They then placed round the trees railings with spiked posts bent outwards to prevent boys from climbing. During the period of the zeppelin raids on dark nights, when the lights in Sheffield were put out in pursuance of powers given by the Defence of the Realm Regulations, the plaintiff walked into the obstruction and damaged his eye. There the local authority had placed the danger in the street with no sufficient guard.

If, however, *Morrison's* case (3) is not properly distinguishable from the other cases on the grounds suggested, and is in conflict with them, we think that this court is bound in this case, as it was in *Greenwood's* case (1) and in *Wodehouse's* case (2), to follow the decision of the House of Lords in *Great Central Ry. Co. v. Hewlett* (5). For these reasons, we think that the judge came to a wrong conclusion with regard to the law, and, consequently, this appeal ought to be allowed.

Although, in view of the conclusion at which we have arrived, it is not essential to decide the point, we think that the judge was also in error in holding that, on the evidence before him, the council was guilty

of any negligence in not distinguishing obstructions in subsidiary streets until after those in the principal thoroughfares had been distinguished. The time at the disposal of the council was in reality only 15 days, for we do not think that it can properly be said that, if the council were under a duty to distinguish obstructions so that they might be visible in the event of a blackout order, the council ought to have started the work necessary for that purpose before the declaration of war. In the result the appeal must be allowed, with costs here and below. A

There is one matter, however, to which it is necessary to direct particular attention. The evidence called at the hearing was mainly directed to the question whether or not the plaintiff's illness was the result of the accident which he suffered, and also to the quantum of damages, matters not in dispute in this court, yet the whole of the evidence given in the court below was transcribed and three copies of the transcript made for the use of this court. Further, the whole of the correspondence passing between the parties and their respective solicitors between Oct. 7, 1939, and Aug. 9, 1940, covering 36 pages, was copied, and three bundles were supplied for the use of the court. It seems plain that most of such transcription and copying was entirely useless. In the circumstances, we think it right that a special direction should be given to the taxing master that, in taxing the costs of the appeal, he should disallow the successful appellant all costs incurred by reason of the obtaining of the transcript and the copies thereof so far as such evidence was unnecessarily transcribed and copied, and that a similar direction should be given with regard to the copies of the correspondence. B C D

Appeal allowed with costs in both courts. E

Solicitors : *J. E. Arnold James* (for the appellants) ; *J. Tickle & Co.* (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

**FINSKA CELLULOSAFORENINGEN v. WESTFIELD
PAPER CO., LTD.**

[KING'S BENCH DIVISION (Viscount Calkcote, L.C.J.), **November 27, 1940.**]

A *Sale of Goods—C.i.f. contract—Documents to be tendered Bill of lading referring to charterparty—Whether charterparty necessary document—Inclusion of war risks clause in bill of lading—Reasonable and customary clause.*

By a contract dated Dec. 9, 1938, the plaintiffs agreed to sell to the defendants a quantity of woodpulp. Part of this woodpulp was shipped on board the Lapponia, under a bill of lading dated Jan. 31, 1940, for carriage to Leith. The bill of lading contained the following clause: "All conditions and exceptions as per charterparty dated (blank)." Past shipments had been made in vessels chartered on the terms of the Baltpulp charter, and it was found that the defendants understood what was intended by the clause and were aware that shipment would take place on the same conditions as in the past, and that, therefore, the interpretation of the clause was not affected by the words "charterparty dated." The bill of lading contained a further clause, entitled "F.A.A. Current War Risk Clause," which gave the master a discretion, in the case of war or hostilities rendering the prosecution of the voyage unsafe, to land the goods at any port he might consider safe at the shippers' risk and expense, where for all purposes the voyage should be considered terminated. The Lapponia sailed on Feb. 7, 1940, but, shortly after the middle of May, she discharged her cargo at Kotka in Finland. Meanwhile the bill of lading duly indorsed, an invoice, together with debit note for additional insurance, and a certificate of insurance of marine risks were sent to the defendants. The plaintiffs claimed for the c.i.f. price of the goods, less a prepayment which had been made in respect of freight. The defendants contended (i) that the charterparty should have been produced with the invoices, bill of lading and policies of insurance, and (ii) that the inclusion of the F.A.A. Current War Risk Clause was not at any material time reasonable or usual in the trade, and was accepted by the plaintiffs without the knowledge or consent of the defendants and its insertion no longer made the bill of lading one for carriage of goods to Leith. The F.S. Co. had invariably included this clause in their bills of lading since the outbreak of war, and there was evidence that similar clauses had been used in Swedish and Norwegian bills of lading:—

F **HELD:** (i) in the circumstances of the case, the tender of the bill of lading duly indorsed was sufficient compliance with the contract of sale, and there was, therefore, no necessity to produce the charterparty.

(ii) the insertion of the F.A.A. Current War Risk Clause did not prevent the bill of lading from being one for the carriage of goods to Leith. The question whether a clause introduced into a bill of lading is usual and proper in the performance of a c.i.f. contract is a question of fact. On the evidence, the F.A.A. Current War Risk Clause was usual and current in the trade, and the bill of lading was not defective by reason of its inclusion.

G **[EDITORIAL NOTE.** Mercantile custom has fixed the documents to be tendered in the case of a c.i.f. contract as being the bill of lading, the invoice and the policy of insurance. It is here sought to be said that, because the conditions and exceptions in the bill of lading are defined by reference to the charterparty, this latter document should also be tendered. This argument is rejected as being contrary to custom and the decisions on the point. The remainder of the case deals with the reasonableness of the war risks clause attached to the bill of lading. This, though wide in its terms, is held to be reasonable and usual in the trade.

AS TO C.I.F. CONTRACTS, see HALSBURY, Hailsham Edn., Vol. 29, pp. 211, 212, para. 281; and FOR CASES, see DIGEST, Vol. 39, pp. 576-581, Nos. 1805-1836.]

Cases referred to :

- (1) *Ireland v. Livingston* (1872), L.R. 5 H.L. 395; 39 Digest 560, 1677; 41 L.J.Q.B. 201; 27 L.T. 79; *revsg.* (1870), L.R. 5 Q.B. 516; & *restg.* (1866), L.R. 2 Q.B. 99.
- (2) *Horst (E. Clemens) Co. v. Biddell Brothers*, [1912] A.C. 18; 39 Digest 575, 1801; 81 L.J.K.B. 42; 105 L.T. 563; *revsg.* [1911] 1 K.B. 934.
- (3) *Johnson v. Taylor Brothers & Co., Ltd.*, [1920] A.C. 144; 39 Digest 660, 2515; 89 L.J.K.B. 227; 122 L.T. 130.
- (4) *Malmberg v. Evans (H. J.) & Co.* (1924), 41 T.L.R. 38; 39 Digest 579, 1821.
- (5) *Burstall & Co. v. Grimsdale & Sons* (1906), 11 Com. Cas. 280; 39 Digest 578, 1815.
- (6) *Landauer & Co. v. Craven & Speeding Brothers*, [1912] 2 K.B. 94; 39 Digest 577, 1811; 81 L.J.K.B. 650; 106 L.T. 298.
- (7) *Groom (C.), Ltd. v. Barber*, [1915] 1 K.B. 316; 39 Digest 576, 1802; 84 L.J.K.B. 318; 112 L.T. 301.
- (8) *Shepherd v. Harrison* (1871), L.R. 5 H.L. 116; 39 Digest 520, 1355; 40 L.J.Q.B. 148; 24 L.T. 857.

ACTION for the sum of £3,169 5s. 10d., being money due under a contract of sale of 4,000 tons of sulphite pulp. The facts are fully set out in the judgment.

Gilbert Paull, K.C., and *A. J. Hodgson* for the plaintiffs.

Sir Robert Aske, K.C., and *G. G. Honeyman* for the defendants.

VISCOUNT CALDECOTE, L.C.J. : The plaintiffs are an amalgamation of woodpulp manufacturers in Finland, comprising all the manufacturers with one exception. The defendants are paper manufacturers belonging to what is called the Inveresk group. The plaintiffs bring their action upon a contract, dated Dec. 9, 1938, and made between themselves as sellers and the Donside Paper Co. (which also belonged to the Inveresk group) as buyers, for the sale of 4,000 tons of Kajaani sulphite pulp. The defendants were at a later stage substituted as buyers for the Donside Paper Co. Shipment was to be from Finland, reasonably spread to buyers' requirements, and to be completed as far as possible by Dec., 1940. The buyers agreed to pay for the pulp at the rate of £10 per ton c.i.f. Aberdeen by acceptance of draft payable in London at three months from the date of bill of lading. Modifications of the terms of the contract of sale were afterwards made by which Hackman pulp was substituted for Kajaani and the buyers were to pay for the pulp at the rate of £17 per ton c.i.f. Leith. Approximately 253 tons of Hackman pulp was shipped on board the *Lapponia*, belonging to the Finnish Steamship Co., under a bill of lading dated Jan. 31, 1940, for carriage to Leith. The bill of lading was made out in favour of the sellers' agents, Price & Pearce. The *Lapponia* sailed on Feb. 7, but, shortly after the middle of May, her cargo was discharged at Kotka, in Finland. Meanwhile, documents had been sent to the defendants, or to their agents, Messrs. McCrow, in purported compliance with the terms

- of the contract of sale. An invoice, together with a debit note for additional insurance, was sent to Messrs. McCrow on Feb. 21, 1940, and a certificate of insurance of marine risks was also sent to them on Mar. 4. The bill of lading duly indorsed was sent on Apr. 15, by Price & Pearce direct to the defendants, as being in completion of the
- A shipping documents A request for payment of £3,131 15s., the f.o.b. value, and £279 5s. 6d., the cost of additional or war risk insurance, had been made to Messrs. McCrow on Apr. 12, and on Apr. 26 a further request was made for payment of these amounts totalling £3,411 0s. 6d. A payment of £1,140 10s. 11d. covering freight had been made to the
- B plaintiffs' agents by Messrs. McCrow on Feb. 23. It appears that, after receiving the bill of lading from the sellers' agents, the defendants kept it for some time and then sent it to Messrs. McCrow. In a letter written on May 9 Messrs. McCrow raised various questions concerning the bill of lading, and particularly the war risk clause, and declined to take any
- C responsibility in regard to the woodpulp on board the *Lapponia*, the movements of which, they said, were no concern of theirs. I observe that on Apr. 26 Messrs. McCrow intimated to the sellers' agents by letter that they could not make payment against shipping documents until they were certain that the ship had reached British territorial
- D waters. This was clearly not a position which Messrs. McCrow, on behalf of the defendants, were entitled to take. It was the first indication of any unwillingness on the part of the defendants to pay on presentation of the shipping documents. No evidence was called by the defendants, and I was left in the dark as to whether or not, when
- E Messrs. McCrow wrote these letters, they were aware that the bill of lading had already been sent to the defendants. The fact is plain, however, that neither the defendants nor their agents took any objection to the bill of lading until the letter of May 9. In this action, the plaintiffs claim £3,169 5s. 10d., being the c.i.f. price after giving credit
- F for £1,140 18s. 11d. in respect of the prepayment of freight. No question arises as to the correctness of the calculation of the c.i.f. price of the pulp. Strictly speaking, payment was to be made by acceptance of a draft at three months from the date of the bill of lading, but the offer of the plaintiffs' agents to accept payment in cash less 1½ per cent. discount seems to have been treated as a term of the contract. The
- G plaintiffs also claim payment of the cost of war risk insurance as being for the buyers' account.

If the proper shipping documents were tendered by the plaintiffs to the buyers or their agents, the plaintiffs are entitled to recover these

H amounts. By their points of defence, the defendants say that they were entitled to reject the tendered documents, and they specify two grounds on which the documents were defective. Their first ground is that no charterparty has been produced or identified or tendered to the defendants. The bill of lading contained a clause as follows :

All conditions and exceptions as per charterparty dated (blank).

Some evidence was given on behalf of the plaintiffs that the words "charterparty dated" should have been struck out and the word "agreement" inserted. I was referred to bills of lading issued by the Finnish Steamship Co. for the carriage of woodpulp shipped by the plaintiffs, which were in substantially the same form as the bill of lading in this case, and in these bills of lading the word "agreement" had been substituted for the words "charterparty dated." There had been a large number of shipping transactions extending over some years in which the Finnish Steamship Co. had carried woodpulp sold by the plaintiffs on c.i.f. terms. In former years, the practice had been for the plaintiffs' agents to supply their buyers towards the end of the year with particulars of the freight conditions upon which shipment of wood pulp would take place in the course of the following season. The last time this was done in the case of buyers belonging to the Inveresk group was in 1937. The buyers were informed that the terms of what is known as the Baltpulp charter would govern the shipments. A witness who was called on behalf of the plaintiffs, and who was employed by their agents as invoice clerk, stated that no question had ever been raised as to the meaning of the words "as per agreement," and that he had never been asked to identify the agreement. Another buyer from the plaintiffs gave similar evidence, except that he carried the practice a year later. In Dec., 1938, Price & Pearce sent to this witness's firm particulars of the contract of affreightment relating to Jan., 1939, to Dec., 1939. This seems to be the explanation of the phrase which occurs in a number of the bills of lading produced before me :

All conditions and exceptions as per agreement.

I do not think that the fact that the clause in this case was left with the words "charterparty dated" standing really affects the interpretation of the clause. I think that the defendants and their agents well understood what was intended by the clause, and were aware that shipments would take place, as in the past, in vessels chartered on the terms of the Baltpulp charter. The fact that no objection was raised on the score of this clause until after the action was commenced goes some way to confirm me in this opinion. Counsel for the defendants put his case as high as to say that, in all cases of c.i.f. contracts, the charterparty must be tendered where it is a relevant document. As authority for that proposition, he referred to a passage from the judgment of BLACKBURN, J., in *Ireland v. Livingston* (1), at p. 406 :

... for the balance a draft is drawn on the consignee which he is bound to accept (if the shipment be in conformity with his contract) on having handed to him the charterparty, bill of lading and policy of insurance.

It is to be observed that neither in the judgment of HAMILTON, J., in *Horst (E. Clemens) Co. v. Biddell Brothers* (2) nor in the judgment of KENNEDY, L.J., in that case in the Court of Appeal is there any mention of the charterparty as one of the necessary documents to complete delivery in accordance with the agreement. Nor, again, in *Johnson v.*

Taylor Brothers & Co., Ltd. (3), at pp. 155, 156, where LORD ATKINSON once more stated the sellers' duties under a c.i.f. contract, was there any mention of the charterparty as a necessary document to be produced by the seller, together with the invoices, bill of lading and policy of insurance, in order to entitle him to receive payment.

- A In the circumstances of this case, at any rate, the tender of the bill of lading duly indorsed was, in my opinion, a sufficient compliance with the contract of sale to entitle the sellers to payment of the price of the goods, subject, however, to the second ground on which the defendants allege that the bill of lading was defective. The second ground is that
- B the bill of lading contains a clause entitled "F.A.A. Current War Risk Clause," and that it was not at any material time reasonable or usual in the trade, and was accepted by the plaintiffs without the authority or knowledge or consent of the defendants. The clause in question was printed on a slip which was attached to the bill of lading form in pursuance of a practice which the Finnish Steamship Co. adopted almost immediately after the outbreak of war between Great Britain and Germany. There can be no doubt that the clause gives the shipowners very wide powers. Its terms are as follows :

- D If in the event of the imminence or existence of war, hostilities, warlike operations between any nations and any other contingency in connection therewith, the safe navigation of the vessel should be endangered or carrier's or master's control over the use or movements of the vessel should be interfered with by any power, government or other authority or goods loaded under this B/L or part thereof become contraband of war whether absolute or conditional or liable to confiscation or detention according to international law or the proclamation of any belligerent power, the carrier or master to have the right to discharge the cargo at any convenient port or place, which in the master's opinion is safe and where for all purposes the contract voyage shall be considered terminated, and there discharge the cargo at the risk and expense of the charterer and/or cargo-owner and/or consignee, full B/L freight to be paid and any costs incurred for or on behalf of the cargo to be made good before delivery at such port or place, owners to have an absolute lien on the goods in due payment and their liability under this B/L in all respects to cease upon such discharge.
- E
- F The argument was pressed upon me that a bill of lading under a c.i.f. contract must be in a form which is reasonable and usual in the trade, and that this clause was neither the one nor the other. It was said on behalf of the defendants that the wide discretion given to the master to discharge the cargo at any convenient port or place in the conditions
- G of war stated in the clause had the effect of making the bill of lading no longer one for the carriage of goods to Leith. I do not accept this contention. It is everyday practice to deal in bills of lading with war conditions, or with the interference with a contract of carriage by blockade or similar action, by inserting a clause not different in essence
- H from that to which the defendants take exception. The insertion in a bill of lading of a clause giving a discretion to the master, in the case of war or hostilities rendering the prosecution of the voyage unsafe, to land the goods at any port he may consider safe at shippers' risk and expense does not, in my opinion, prevent the bill of lading from being for the carriage of goods to a named port. Moreover, evidence

was given to show that in this trade this identical clause, or one very like it, has been widely used since the outbreak of war in Sept., 1939. A number of the bills of lading issued by the Finnish Steamship Co. and produced before me contained the clause, and, except in the present case and in the case of one other shipment, no question has been raised concerning the clause. It is true that it has not been the practice to pay the price of the goods before their arrival, but I should have expected some objection to have been taken to the clause if it were so unusual or unreasonable as to render a bill of lading containing it defective as a shipping document under a c.i.f. contract. I was invited to pay no attention to the fact that objection had not been made to the clause in the case of other shipments, because, it was said, there can be no waiver merely by reason of a buyer's omission, even his repeated omission, to insist on his full rights. The judgment of BAILHACHE, J., in *Malmberg v. Evans (H. J.) & Co.* (4) was cited. There the contention made was that buyers could not take objection to the form of a policy of insurance merely because there had been numerous previous transactions in which they had accepted the particular kind of policy without objection. BAILHACHE, J., rejected this contention, but the decision throws no light on the facts of this case. I accept the submission of counsel for the defendants that a bill of lading tendered under a c.i.f. contract must be, as in the case of the policy of insurance, in a form usual or current in the trade. In *Burstall & Co. v. Grimsdale & Sons* (5), KENNEDY, J., considered the question whether clauses introduced into a bill of lading were usual and proper in performance of a c.i.f. contract, and treated it as a question of fact. Here the fact that other shipments have been made of the terms of a bill of lading containing the clause in question is relied on as evidence to show, not that there was waiver, but that the clause is well-known and—to use the epithet insisted on by counsel for the defendants—usual. The Finnish Steamship Co. have a large part of the trade in the carriage of wood-pulp from Finland, and they have invariably included this clause in their bills of lading since the outbreak of war. Many of the shipments made in their vessels were for buyers belonging to the Inveresk group, for all of whom Messrs. McCrow acted as agents, and this firm must have been thoroughly acquainted with the terms of the clause. Another shipping company, the Helsinki Co., have used an almost precisely similar form of clause since the outbreak of war.

In addition to the evidence given of the practice of shipowners, evidence was given by a representative of a firm of manufacturers who buy pulp that he had seen similar clauses in both Swedish and Norwegian bills of lading, and that, though he had not heard of the F.A.A. clause before this case arose, his firm had accepted similar clauses. In the light of this evidence, uncontradicted as it was by evidence on behalf of the defendants, I find as a fact that the clause was a usual one, and current in the trade.

- One further argument, however, which I must deal with was used in support of the contention that the F.A.A. war risk clause made the bill of lading defective. It was said that, however reasonable the clause might be at the date of the making of the contract of affreightment, or at the date of shipment, the time at which the reasonableness or otherwise of the clause should be tested was the date of the contract of sale, and that nobody at that time had even heard of the F.A.A. clause. That does not commend itself to me. If, in Dec., 1938, consideration had been given to provisions to meet war conditions, I see no reason to suppose that such provisions as are contained in the clause, which, as I have already said, are not unfamiliar, would have been ruled out. However, I doubt very much whether the date of sale is the right time to take. This contract was one for delivery of pulp over 12 months, and violent changes of circumstances in that period might well require provisions to be inserted in the bill of lading for the protection of the shipowners. It would be strange if, notwithstanding such circumstances, the sellers under a c.i.f. contract were to be obliged to produce a bill of lading in a form which it might be impossible to procure, and that is what the sellers' position would be if the contention on behalf of the defendants—namely, that the terms of the bill of lading must be only those which were current at the time when the contract of sale was made—is right. For these reasons, I must hold that the bill of lading was not defective by reason of the inclusion of the F.A.A. clause, and was, therefore, properly tendered as one of the documents necessary to entitle the sellers to payment.
- Judgment for the plaintiffs with costs.*

Solicitors : *William A. Crump & Son* (for the plaintiffs) ; *Ballentyne & Co.* (for the defendants).

[Reported by D. K. BELCHER, Barrister-at-Law.]

R. v. HEREFORD LICENSING JJ., *Ex parte* NEWTON.

[KING'S BENCH DIVISION (Viscount Caldecote, L.C.J., Hawke and Humphreys, JJ.), **October 15, 1940.**]

Theatres and Other Places of Entertainment—Sunday entertainments—Building licensed for public dancing—Condition prohibiting dancing on Sundays—Order amending licence by removing condition—Validity—Sunday Observance Act, 1780 (c. 49), s. 1—Public Health Acts Amendment Act, 1890 (c. 59), s. 51—Sunday Entertainments Act, 1932 (c. 51), s. 3.

The Public Health Acts Amendment Act, 1890, s. 51, empowering justices to grant licences for the use of premises for, *inter alia*, public dancing, must be read with the Sunday Observance Act, 1780, s. 1, which makes it illegal to grant a licence for public dancing on Sundays, and does not give or purport to give any power to grant such a licence. Accordingly, justices have no power to make an order amending a licence for the use of premises for public dancing by removing therefrom a restriction against the use of the premises for such purpose on Sundays.

[EDITORIAL NOTE.] The point here is a short one, but there would appear to have been some misunderstanding of the effect of the Sunday Entertainments Act, 1932, s. 3. The judgments herein, however, will remove any such misunderstanding.

As to MUSIC AND DANCING LICENCES, see HALSBURY, Hailsham Edn., Vol. 32, pp. 84-92, paras. 109-123; and FOR CASES, see DIGEST, Vol. 42, pp. 919-924, Nos. 142-189.]

MOTION for an order of *certiorari* to remove into court for the purpose of being quashed an amendment to a licence, dated Feb. 13, 1940, authorising the use of a building in the city of Hereford for the purpose of public dancing, singing, music or other public entertainment of the like kind, subject to the directions, conditions and restrictions contained therein. The Sunday Entertainments Act, 1932, s. 3, provides as follows :

The power of any authority in any area to grant licences under any enactment for the regulation of places kept or ordinarily used for public dancing, singing music, or other public entertainment of the like kind, shall include power to grant such licences in respect only of musical entertainments on Sundays, and the power to attach conditions to any such licence shall include power to attach special conditions in respect of such entertainments on Sundays.

The facts are fully set out in the judgment of VISCOUNT CALDECOTE, L.C.J.

W. E. P. Done for the applicants.

VISCOUNT CALDECOTE, L.C.J. : A licence, dated Feb. 13, 1940, contained this restriction on the use of a building :

The building aforesaid shall not be opened under this licence on Sundays, Good Friday and Christmas Day.

In consequence of certain proceedings against one de Normanville for having used the building in breach of that restriction, an application was made by him to the magistrates for a variation of the existing licence by removing the restriction on the use of the building for public dancing on Sundays. When the application for the removal of the restriction came before the magistrates, the chief constable was not present, and he was not represented, but the application was opposed by the inspector of police, Chief Inspector Wheatley. There seems to have been some doubt as to the precise grounds of opposition to the application, and perhaps the real nature of the opposition only developed during the course of the proceedings, but at some point—possibly after the magistrates had announced their decision, or the decision that they were prepared to give—the chief constable took the point that there was no power to grant a licence for public dancing on Sundays.

The chairman of the magistrates has sworn an affidavit, which has been filed, setting out at some length the reasons which actuated the bench in granting the amendment which was asked for. In the course of the affidavit which he has sworn, it appears that the magistrates were in some way actuated by the view that public dancing could be

allowed as a musical entertainment, but the point which we have to decide is whether there was any power to grant a licence for public dancing on Sundays. The question whether any breach of the licence took place or whether the entertainment which took place on a Sunday evening was a musical entertainment or public dancing is not before us. The sole question is whether there was a power to grant a licence for public dancing on Sundays.

The material legislation we have to consider begins with the Sunday Observance Act, 1780. Sect. 1 of that Act provides as follows :

From and after the passing of this present Act, any house, room or other place which shall be opened or used for public entertainment or amusement, or for publicly debating on any subject whatsoever, upon any part of the Lord's Day called Sunday, and to which persons shall be admitted by the payment of money or by tickets sold for money, shall be deemed a disorderly house or place.

That has the effect of making it illegal to grant a licence for public dancing on Sunday. Under the Sunday Entertainments Act, 1932, which resulted from certain litigation in which the London County Council was concerned, a section was passed with regard to musical entertainment. I mention that only because counsel for the applicants has read the section in connection with this point which I have mentioned as to musical entertainments on Sunday, but there is no power contained in that Act, which, according to its title, permits and regulates "the opening and use of places on Sundays for certain entertainments," with reference to public dancing on Sundays.

In these circumstances, it seems to me that there is no answer to the point, which has been made by counsel for the applicants, that the magistrates in this case had no power to remove the restriction contained in the original licence, because there was no power in them to grant a licence for public dancing on Sundays. The point is a short one. It depends upon a consideration of the legislation which I have mentioned. If there was no power in the magistrates to grant a licence for public dancing on Sunday, it is clear that they had no power to remove the restriction which was contained in the original licence so as to permit public dancing on Sunday. I am clearly of opinion that there was no such power, and there is, therefore, no necessity to go into the other grounds upon which counsel for the applicants relied in support of his argument for the order of *certiorari*. The first ground is a good one, and, in my judgment, an order of *certiorari* must be made for quashing the order which the magistrates made.

HAWKE, J. : I agree.

HUMPHREYS, J. : I also agree. I only desire to add one or two words. The application in this case was in the terms of the Public Health (Amendment) Act, 1890, s. 51. It may well be that that Act was read by the justices as enabling them to grant a licence to any person whom they might think fit to keep a house for the purpose of,

amongst other things, public dancing, singing, music or other public entertainment of the like kind. That Act of Parliament, however, was passed when the Sunday Observance Act, 1780, which then expressly prohibited, and still prohibits, any such thing as public dancing upon Sunday in premises kept or used for that purpose, was in existence. Therefore, in my judgment, sect. 51, which must be read with the old Act, did not give any power, and did not purport to give any power, to anybody to grant a licence for public dancing on Sunday. When that point was being made before the justices, they were referred to the Sunday Entertainments Act, 1932. It is quite true to say that, with regard to certain matters which were prohibited by the Act of 1780, power was given to the justices by the Act of 1932 to grant licences which otherwise they could not have granted, and for the use of premises upon Sunday, but one of those matters is not public dancing. It is true that one of the matters is musical entertainments, which may be given, but, in my judgment that can afford no authority for granting a licence for public dancing on Sundays, which remains as much prohibited on Sundays as it always has been.

Order of certiorari made for quashing the order of the magistrates.

Solicitors: *Sharpe, Pritchard & Co.*, agents for *T. B. Feltham*, Town Clerk, Hereford (for the applicants).

[*Reported by C. ST. J. NICHOLSON, Esq., Barrister-at-Law.*]

IN THE ESTATE OF SANPIETRO. IN THE ESTATE OF VAN TUYLL VAN SEROOSKERKEN (BARON).

[PROBATE, DIVORCE AND ADMIRALTY DIVISION (Sir Boyd Merriman, P.),
November 5, 1940.]

Executors—Administration—Grant ad colligenda bona—Estate of enemy alien—Grant to Public Trustee—Special powers—Motion in court when necessary—Supreme Court of Judicature (Consolidation) Act, 1925 (c. 49), s. 162—Administration of Justice Act, 1928 (c. 26), s. 9 (b).

Two Italian subjects resident in Milan were entitled to a reversionary interest in a trust fund in England which fell into possession on the death of their mother, an Englishwoman married to an Italian. A firm of solicitors, acting as attorneys in England for the two brothers to obtain administration, paid £600 in estate duty and incurred certain costs both before and after the date of the entry of Italy into the war.

A Dutch subject, domiciled in the Netherlands, died in England, naming as his executor his brother resident in Holland. His will provided for a life interest to his widow, resident in England, in certain property situated in England. Certain debts and funeral expenses were paid on behalf of his estate. In each case application was made for a grant of administration *ad colligenda bona* in a modified form to give the Public Trustee power in the special circumstances to re-imburse the persons who had paid out moneys on behalf of the respective estates, and also, in the second case, to pay the widow the income as provided by the will:—

HELD: (i) the suggested modifications were right and proper in each case, and a grant *ad colligenda bona* was made with the condition that

payment of the income to the widow should be made only with the consent of the appropriate branch of the Treasury.

(ii) an application for a simple grant *ad colligenda bona* may be made direct to the Principal Probate Registry on affidavit, but, where special powers are sought, application must be made in open court.

[EDITORIAL NOTE. The restrictions placed upon dealing with enemy aliens necessarily impose hardship in certain cases. In the present case, it is shown that, applied in all their strictness, they would for a long period keep certain quite innocent persons out of their due share in the estate of a deceased person. The court has here had recourse to the discretionary powers given to it by the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, s. 9 (b), and has appointed an administrator *ad colligenda bona* and given certain restricted powers of administration beyond the mere getting in and preservation of the assets.

AS TO GRANTS *Ad Colligenda Bona*, see HALSBURY, Hailsham Edn., Vol. 14, pp. 274, 275, paras. 484, 485; and FOR CASES, see DIGEST, Vol. 23, pp. 207-209, Nos. 2446-2483.]

Cases referred to :

- C (1) *In the Estate of Schiff*, [1915] P. 86; 2 Digest 158, 284; 84 L.J.P. 79; 113 L.T. 189.
 (2) *In the Estate of Grundt*, *In the Estate of Oetl*, [1915] P. 126; 2 Digest 158, 286; 84 L.J.P. 175; 113 L.T. 189.
 (3) *Re Fischer*, [1940] 2 All E.R. 252; Digest Supp.

D MOTIONS for grants of administration under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, as amended by the Administration of Justice Act, 1928, s. 9, in respect of the estates of Ina Fanny Sanpietro, deceased, and Baron Van Tuyll Van Serooskerken, deceased, respectively. Both the deceased were enemy aliens. The facts are fully set out in the judgment.

Hon. Victor Russell for the Public Trustee.

W. R. K. Merrylees for Baroness van Tuyll van Serooskerken.

SIR BOYD MERRIMAN, P.: In these two cases, the Public Trustee, has moved the court for grants *ad colligenda bona*. I emphasise the fact that he is applying as Public Trustee in both cases. In greater or less degree, the interests of enemy aliens are involved. The Public Trustee is also the Custodian of Enemy Property, but, in the affidavit which he has put before the court, he emphasises that in that latter capacity he has no power to apply for grants of this kind. Nevertheless, the dual capacity occupied by him has many obvious advantages from the point of view of applications of this sort. About the propriety of making a grant *ad colligenda bona* to the Public Trustee there is no dispute, but in both cases I am asked to modify the ordinary form of grant *ad colligenda bona* by giving certain extra powers to the Public Trustee.

Dealing with the matter quite generally first, it was plainly settled in *In the Estate of Schiff* (1) and *In the Estate of Grundt* (2) that the circumstance that the executor or beneficiaries in an estate have become enemy aliens by the outbreak of war is a special circumstance entitling

the court to make a grant to the Public Trustee under the Supreme Court of Judicature (Consolidation) Act, 1925, s. 162, or, as it then was, the Court of Probate Act, 1857, s. 73, and it is said that, by virtue of the Administration of Justice Act, 1928, s. 9 (b), the court has power to modify the strictness of a grant merely *ad colligenda*, and to give the Public Trustee limited powers, at any rate, of actual administration. A The material words are :

If . . . by reason of other special circumstances, it appears to the court to be necessary or expedient to appoint as administrator some person other than the person who, but for this provision, would by law have been entitled to the grant of administration, the court may in its discretion, notwithstanding anything in this Act, appoint as administrator such person as it thinks expedient, and any administration granted under this provision may be limited in any way the court thinks fit. B

Those words enable a creditor to obtain an unrestricted grant of administration. The effect of that is that a creditor can retain his debt in the process of administration. What is asked for here, however, is that the grant *ad colligenda* should be modified by enabling certain powers referable to administration to be exercised. I see no reason to doubt that, under words as wide as those which I have read, the court has such power, and, if I can make a grant of administration pure and simple to the Public Trustee, though I am not invited to do so, for reasons which are set out in his affidavit, it seems to me to be reasonably clear that I have power to modify the strictness of a grant *ad colligenda* in the way proposed. C D

If authority were needed for this proposition, I think that it is to be found in *Re Fischer* (3), where HODSON, J., made a grant of administration to a German national resident in this country while at the same time limiting it by provisions that a return be made to the Custodian of Enemy Property and that no part of the estate or proceeds be transmitted to members of the family residing abroad. At any rate, I propose to accede to the application of the Public Trustee for a grant *ad colligenda*, modified as I have said. E F

That brings me to the special circumstances of the two cases. In the first motion, I am dealing with the estate of Ina Fanny Sanpietro, an Englishwoman who was married in 1878 to an Italian who died in 1891. The widow herself died intestate in Mar., 1939, before the entry of Italy into the present war. She left two out of five children her surviving. By the death of the other three children she had become entitled to certain property, and, under the will of her own father, an Englishman, she had a life interest in part of his estate now represented by investments amounting in value to about £3,700. These two surviving children, who had been born in England, and who, I understand, were resident in England, had also before the outbreak of war executed a power of attorney to certain English solicitors to obtain administration, and, in the ordinary course of their business, these solicitors had disbursed about £600 in estate duty, and also had inevitably G H

incurred certain costs. I am now speaking only of the costs incurred before the entry of Italy into the present war, but they have also incurred certain costs as preliminary to, and as incidental to, the bringing forward of this motion. Those costs were incurred, of course, after Italy entered into the war. It is suggested that in this case I should

A give the Public Trustee power to re-imburse to the solicitors the estate duty which they have paid and the costs which they have incurred under both headings, both those incurred in the exercise of the power of attorney before Italy came into the war and those which they have incurred as incidental to, or preliminary to, this application after the

B power of attorney had become void by virtue of the Trading with the Enemy Act, 1939. I see no reason at all why I should not grant these powers. I think, in the circumstances of the case, that to do so is both appropriate and desirable, and I shall make an order accordingly.

In the other motion, I am dealing with the estate of Baron Van Tuyll

C Van Serooskerken, a Dutch subject formerly resident in Austria, but at the time of his death in Jan., 1940, resident in this country, though, of course, still domiciled in Holland. Without going into the whole history of the executorship, it is sufficient to say that at the time of his death the sole executor was a brother resident in Holland who

D survived him. By a power of attorney given in Mar., 1940, before the subjugation of Holland, this executor also had appointed two London solicitors to be his attorneys to obtain administration. They also had paid the estate duty, and, the estate duty having been paid, the papers were lodged at Somerset House one day before the invasion of Holland.

E In this case, the English property, worth about £12,000, goes under the will to the widow for life, and, after her death, to various beneficiaries, including the executor and his children. There are beneficiaries who are not enemies within the meaning of the Trading with the Enemy Act, 1939, but the executor and his children are so tainted. In these

F circumstances, it is suggested that in this case the Public Trustee should have power to re-imburse to various persons the payments they have made in respect of the deceased's debts in this country, and in respect of the expenses of his illness and his funeral expenses, the whole amounting to about £173, and to pay the widow, subject to the consent

G of the Trading with the Enemy branch of the Treasury and the Board of Trade, the income from the English estate, to which she is entitled for her life, and also to pay the solicitors costs, whether incurred under the power of attorney before it was vacated or incurred as incidental to this motion. Here, again, I think that the suggested modifications are

H right and proper. It is true that this is going a good deal further than in the other case, because it involves the payment of the whole of the income to the widow so long as the estate is subject to the provisions of the Trading with the Enemy Act, 1939, but, in the circumstances of this case, I think that that is a proper provision. It may be that, in the circumstances, the consent of the Trading with the Enemy branch

of the Treasury is a mere formality, but I think that that term should be imposed. I propose, therefore, to make a grant *ad colligenda* with these modifications, as set out in the affidavit of the Public Trustee.

There is only one other point to be dealt with. Counsel for the Public Trustee has invited the court to say that in similar circumstances it should not be necessary to move the court itself, but that application A for grants *ad colligenda*, with or without modifications of the kind with which I have been dealing, should be made direct to the Principal Probate Registry on affidavit. I see no reason why applications for simple grants *ad colligenda* should not be so made, and I am prepared to rule that that shall be the appropriate procedure in future. However B on reflection, counsel for the Public Trustee agreed with me that that would not be the appropriate procedure where special powers are asked for. In those cases, as heretofore, it will be appropriate that the motion should be made in open court to a judge.

Solicitors : *Walbrook & Hosken* (for the Public Trustee). C

[Reported by D. ARMSTEAD FAIRWEATHER, ESQ., Barrister-at-Law.]

Re I. G. FARBENINDUSTRIE AKTIENGESellschaft AND BAYER PRODUCTS, LTD. D

[CHANCERY DIVISION (Morton, J.), November 21, 22, 1940.]

Patents—Rectification of register—Vesting order—Enemy alien bare trustee for British company—Interference with Comptroller's emergency powers— Trading with the Enemy Act, 1929 (c. 89), s. 4—Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939 (c. 107), s. 2. E

A number of patents, of which an enemy alien was the registered proprietor, were alleged to be in the beneficial ownership of a British company. The company applied for a vesting order vesting the letters patent in it, and for the consequential rectification of the register :—

HELD : (i) in these circumstances, the vesting order would not be an assignment of a chose in action by or on behalf of an enemy within the meaning of the Trading with the Enemy Act, 1939, s. 4. F

(ii) the difficulties, created by the war, of inquiring into the beneficial ownership of the patents were no reason for not determining the question between the parties now.

(iii) the making of a vesting order would not operate to interfere with the powers of the Comptroller under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2. G

[EDITORIAL NOTE.] The decision here is that a vesting order made by the court is (a) not such an assignment of a chose in action as is contemplated by the Trading with the Enemy Act, 1939, and (b) if it be such, then it is not, in the circumstances of this case, made by or on behalf of an enemy. The enemy being a bare trustee, the assignment must be made on behalf of the beneficial owner. The second point is of equal, and probably of more general, interest. The difficulties attending the trial of actions at the present time are very considerable, but the very fact that the courts are kept open shows that it is intended that these difficulties shall be overcome. Litigants who desire that their differences shall be determined are entitled to have their cases heard, and it is no reason for postponement that the H

hearing is attended with difficulty. A case where it is shown that there is good reason to believe that injustice would be done if an adjournment is not granted can be met by adjournment of the proceedings, but, until that is shown, either party is entitled to insist upon a decision being reached.

AS TO TRADING WITH THE ENEMY, see HALSBURY, Hailsham Edn., Vol. 1, pp. 460, 461, para. 779; and FOR CASES, see DIGEST, Vol. 2, pp. 162-188, Nos. 330-512.]

- A APPLICATION by Bayer Products, Ltd., for an order under the Trustee Act, 1925, s. 51, and the Patents and Designs Acts, 1907-1932, s. 72, that the letters patent 231, 150 and others registered in the name of I.G. Farbenindustrie Aktiengesellschaft and the inventions covered thereby be vested in Bayer Products, Ltd., and that the register of patents be accordingly rectified. The applicant company, Bayer Products, Ltd., was formed on May 25, 1923, by the American company Bayer Co. Inc., itself a subsidiary of Sterling Products. Bayer Co. Inc. caused Bayer Products, Ltd., to enter into an agreement with Leverkusen, a German firm. By this agreement, dated Sept. 1, 1923, it was provided, *inter alia*, that Leverkusen should be entitled to half of the profits available for dividends, and by cl. 4: "Leverkusen shall forthwith and from time to time assign to the company but without consideration and at the cost of the company any and all letters patent," etc. In 1925, Leverkusen were dissolved by I.G. Farbenindustrie Aktiengesellschaft (hereinafter called I.G.). By two agreements dated Nov. 15, 1926, the first between I.G. of the first part and Bayer Co. Inc. of the second part, and the second between I.G. of the first part and Bayer Products, Ltd., of the second part, it was provided that I.G. should take over all agreements of Leverkusen, and that the agreements should have the same effect as if I.G. were substituted for Leverkusen. The evidence showed that Bayer Products, Ltd., had no factory in England, and the respondents, Imperial Chemical Industries, Ltd., had applied for, and been granted, the right to work some of the patents in question by the Comptroller, pursuant to the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2.

C. E. Harman, K.C., and W. Gordon Brown for the applicants.

W. Trevor Watson, K.C., and G. H. Lloyd-Jacob for the respondents.

- G MORTON J.: It is alleged by the applicants that the applicant Bayer Products, Ltd., is beneficially entitled to the patents in question, and that the party in whose name the patents at present stand—namely, as regards the large bulk of these patents, I.G. Farbenindustrie Aktiengesellschaft, a German company—is a bare trustee of the patents for Bayer Products, Ltd. At this stage I have formed no view as to whether or not I.G. (as I shall call it) is a bare trustee for Bayer Products, Ltd. I must decide this preliminary point which I am about to state on the assumption that I.G. is such a bare trustee.

Counsel for the respondents, Imperial Chemical Industries, Ltd., has submitted that this application should be refused on the threshold by

reason of the provisions of the Trading with the Enemy Act, 1939, s. 4, which, so far as material, provides as follows :

(1) No assignment of a chose in action made by or on behalf of an enemy shall except with the consent of the Treasury, be effective so as to confer on any person any rights or remedies in respect of the chose in action. . . .

The submission of counsel for the respondents is that, if I make the order which is asked for on this application, that will amount to an assignment of a chose in action made by or on behalf of an enemy, with the result that, as the sanction of the Treasury has not been obtained, such assignment will not be effective so as to confer on the applicants any rights or remedies in respect of the chose in action, and he suggests that, in these circumstances, the court will not make the order applied for. In my view, the making of a vesting order by the court is not an assignment of a chose in action within the Trading with the Enemy Act, 1939, s. 4. Assuming that the order which is sought on this application can be described as an assignment of a chose in action at all, it would not be an assignment made by or on behalf of an enemy. It would be made on the application of a person claiming to be beneficially interested. It would indeed be strange, I think, if some British subject who owned property, vested at the moment in a German as a bare trustee for the British subject, were not entitled to come to the court and ask for a vesting order in respect of that property without first obtaining the sanction of the Treasury. I cannot believe that that is the effect of the section.

For the sake of simplicity, I propose at this stage to deal with this application as if it only referred to the patents specified in Part I of the schedule to the summons which are at the moment in the name of I.G. The other parts of the schedule contain comparatively few patents, and I do not know whether or not different considerations will arise. It has been argued by counsel for the respondents that, even if I am satisfied on going into the evidence that the applicants Bayer Products, Ltd., are beneficially entitled to these patents, and that I.G. are bare trustees for the applicants, I should not make a vesting order. After some discussion it was agreed that it would be convenient if I were to decide this general question before investigating the title of the applicants to the numerous patents specified in Part I of the schedule to the summons, because, if I come to the conclusion that, even if their title were proved, I should not make a vesting order, a great deal of time might be saved.

I should say at this juncture that counsel for the applicants submitted that counsel for Imperial Chemical Industries, Ltd., had no right to be heard at all upon this matter, as his clients had no beneficial interests whatever in the patents in question, but, upon my intimating that I should desire the assistance of their counsel on this matter, counsel for the applicants raised no further objection to his being heard. It is submitted by counsel for the respondents, first of all, that I should not inquire at all into the title of the applicants to these patents. He

says, and says truly, that these are unusual times, and he points out that for a large number of years I.G. have been on the register in respect of these patents, and he suggests that now is not the time to investigate whether or not the applicants on this summons are the beneficial owners. I cannot take that view. The object of keeping

- A the courts in being in discharge of their usual functions during wartime is to determine the rights of litigants who seek to have their rights determined. In this case the applicants say: "We are the beneficial owners of these patents. We desire to satisfy the court of that, and when we have satisfied the court of that, we ask for a vesting order and
- B for rectification of the Register of Patents." I can find nothing in the facts of this case which should lead me to refuse to determine the question of the beneficial ownership of these patents.

A further question then arises. Assuming that I find, on investigating the facts further, that there are certain patents, either some or the whole of those specified in Part I of the schedule to the summons, whereof

- C I.G. are bare trustees for the applicants, ought I to make a vesting order? Counsel for the respondents has submitted that there are considerations arising in this case which should lead me to refuse to make a vesting order even if I am satisfied that I.G. are bare trustees for
- D the applicants. He points out that, as far as the evidence goes, Bayer Products, Ltd., have not a factory of their own in this country, and that, in respect of some of these patents, what are called compulsory licences have been granted by the Comptroller under the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2. He
- E also says, and it may well be so, that it is very important that products of the character which are the subject of the patents in question in this summons should be manufactured in this country. Further, he asked me to have regard to the conduct of the parties, and suggests that the motives of the applicants in seeking a vesting order should be inquired
- F into.

On this part of the case it is perhaps not irrelevant to know that on Feb. 12, 1940, a letter was sent to the Comptroller by the solicitors acting for the applicants in the following terms:

- G We enclose herewith a copy of the summons for a vesting order covering a number of patents which stand in the name of the I.G. or their nominees. The formalities before the master have now been completed and the application will come before the judge on Monday, the 19th instant. We are unable to indicate the time at which the application will be heard until the list is issued next Friday. Although the application is an *ex parte* application, the master suggested that you should be informed on the summons so that you may consider whether you desire to raise any point on it and, if you have no objection to the order being made, perhaps
- H you would be good enough to send a representative to consent to the order when the case comes in the list on Monday. We shall be glad if you will let us know whether this step will be taken. In order that you may be fully acquainted with the facts, we also enclose copies of the affidavits in support of the application and, if you desire, we will produce to you copies of the exhibits mentioned in the evidence.

To that the Comptroller replied as follows:

With reference to your letter of the 12th instant regarding the summons for an

order of the court under the Patents and Designs Acts, 1907 to 1939, s. 72, for the rectification of the Register of Patents in respect of a number of patents now standing in the name of I.G. Farbenindustrie A.G. I am directed by the Comptroller to say that he does not desire to offer any observations upon the matter nor does he propose to appear or to be represented at the hearing of the summons unless the court so directs. . . .

Then the Comptroller reminds the applicants' solicitors of the provisions of the Patent Rules, 1939, r. 123. It is true that the Comptroller did not appear or send a representative to consent to the order, but he did say that he did not desire to offer any observations upon the matter. That is not by any means conclusive, but it is one element to be taken into consideration, I think. A

The question really comes to this. Am I inclined to say at this stage of the proceedings that, even if I find that I.G. are bare trustees for the applicants, I shall not make a vesting order? I am not inclined to arrive at any such conclusion or to make any such statement. The fact being that I propose to investigate the alleged beneficial title of the applicants, I, for my part, cannot see that it is going to embarrass the Comptroller to any greater extent if I then proceed to make a vesting order. By the Patents, Designs, Copyright and Trade Marks (Emergency) Act, 1939, s. 2 (1) (a), it is provided as follows: B C

(1) Where (a) an enemy or an enemy subject is, or has at any time since the beginning of Sept. 3, 1939, been, whether alone or jointly with any other person the proprietor of a patent. . . D

If I determine the beneficial ownership of these patents, whether or not I make a vesting order, and if I decide that I.G. was a bare trustee for the applicant company, it still remains the fact that since Sept. 3, 1939, I.G. has been on the register in respect of these patents. To my mind, whether I make a vesting order cannot in any way affect the question whether I.G. has been since Sept. 3, 1939, the proprietor of a patent. I do not think that it would be right for me to express any view one way or the other on that matter. In saying this, I am not intending to indicate any doubt whether the person on the register in respect of a particular patent is the proprietor of the patent within the terms of sect. 2 of the Act. I am not determining the matter one way or the other, or expressing any views upon it. However, it seems to me that whether or not I make a vesting order on the present application cannot possibly affect the powers of the Comptroller under sect. 2 of the Act in question one way or the other. Either he has those powers or he has not. If he has, the making by me of a vesting order will not deprive him of them. E F G

As regards the other reasons put forward by counsel for the respondents as to why a vesting order should not be made, even if I am satisfied as to the beneficial ownership of the applicants, I do not think that I need deal with them in detail. I need say only that I have not found any reason why I should determine here and now that in no case will I grant a vesting order if I am satisfied of the beneficial title of the applicant. If and when I am satisfied that the applicants are the beneficial owners H D

of a particular patent, I propose to consider whether or not I shall grant a vesting order. I do not intend to fetter my discretion here and now, but I now say that, it having been suggested that in all cases I should refuse a vesting order, I do not propose to take any such step.

Solicitors: *McKenna & Co.* (for the applicants); *E. C. G. Clarke* (for the respondents).

[Reported by *IRENE G. R. MOSES, Barrister-at-Law.*]

POTTS *v.* HICKMAN.

B [HOUSE OF LORDS (Viscount Simon, L.C., Viscount Maugham, Lord Thankerton, Lord Wright and Lord Romer), **July 30, 31, August 1, 6, 7, December 9, 1940.**]

Distress—Priority—Distress for rent and distress for rates.

C *Rates and Rating—Distress for rates—Rent in arrear—Claim by landlord for rent out of proceeds of distress—Whether distress an execution—Landlord and Tenant Act, 1709 (c. 14), s. 1.*

D The respondent was the owner of a house let on a quarterly tenancy. The tenant fell into arrears with her rent and the respondent obtained an order for leave to distrain. In the meantime the appellant, a bailiff for the corporation of Wolverhampton, had levied on the tenant under a warrant of distress for rates. The respondent claimed that the amount due for rent for a period up to one year was a first charge on the proceeds of the sale of the distress, basing his claim on the Landlord & Tenant Act, 1709, s. 1. The appellant contended that the word "execution" in that section did not include a levy for rates:—

E HELD: the word "execution" in the Landlord and Tenant Act, 1709, s. 1, did not include a levy for rates, as it applied only to a process based on a judgment in an action *inter partes*.

Decision of the Court of Appeal ([1939] 3 All E.R. 794) reversed.

F [EDITORIAL NOTE. The point here is a very short one and is whether, upon the proper construction of the Landlord and Tenant Act, 1709, s. 1, the word "execution" as there used includes a levy for rates. Their Lordships have expressed surprise that the question has not been the subject of a reported decision, since the Act has been on the Statute Book for over 200 years. The Court of Appeal unanimously decided in favour of the priority of the rent over the rates. This decision is reversed. The words in the section, in the view of the House of Lords, all point to an action *inter partes*, a judgment in that action, and then execution based on that judgment. A summons for the issue of a distress warrant **G** for unpaid rates is not a proceeding *inter partes* nor is it followed by a judgment. Therefore the levy of a distress for rates is not an execution within the section and the landlord has no priority.]

AS TO PROVISION FOR PAYMENT OF RENT ON EXECUTION, see HALSBURY, *Hailsham Edn.*, Vol. 14, pp. 63, 64, para. 109; and FOR CASES, see DIGEST, Vol. 21, pp. 521-524, Nos. 963-977.]

H Cases referred to:

- (1) *R. v. Speed* (1702), 12 Mod. Rep. 328; 18 Digest 429, 1664.
- (2) *Hutchins v. Chambers* (1758), 1 Burr. 579; 18 Digest 358, 956; *sub nom. Hutchins v. Whitaker*, 2 Keny. 204.
- (3) *R. v. Benn & Church* (1795), 6 Term Rep. 198; 18 Digest 403, 1431.
- (4) *Henchett v. Kimpson* (1762), 2 Wils. 140; 21 Digest 522, 965.
- (5) *Altham's Case* (1610), 8 Co. Rep. 150b; 1 Digest 8, 50.

- (6) *Brandling v. Barrington* (1827), 6 B. & C. 467; 18 Digest 344, 802.
- (7) *Seaman v. Burley*, [1896] 2 Q.B. 344; 18 Digest 422, 1603; 65 L.J.M.C. 208; 75 L.T. 91.
- (8) *Tracy v. Talbot* (1704), 6 Mod. Rep. 214; 38 Digest 452, 191.
- (9) *R. v. Stafford JJ.* (1835), 5 Nev. & M.K.B. 94; 1 Har. & W. 328; 18 Digest 418, 1573.
- (10) *R. v. De Caux* (1815), 2 Price, 17; Digest Supp.
- (11) *Taylor v. Lanyon* (1830), 6 Bing. 536; 18 Digest 343, 793; 8 L.J.O.S.C.P. 180. A
- (12) *Giles v. Grover* (1832), 9 Bing. 128; 16 Digest 226, 169; *previous proceedings sub nom. R. v. Giles* (1820), 8 Price, 293.
- (13) *Re Mackenzie, Ex p. Hertfordshire (Sheriff)*, [1899] 2 Q.B. 566; 18 Digest 344, 796; 68 L.J.Q.B. 1003; 81 L.T. 214.
- (14) *Harper v. Carr* (1797), 7 Term Rep. 270; 18 Digest 398, 1390; *subsequent proceedings*, 7 Term Rep. 448. B
- (15) *R. v. Middlesex JJ.* (1757), 2 Keny. 163; 18 Digest 398, 1339.
- (16) *R. v. Price* (1880), 5 Q.B.D. 300; 18 Digest 398, 1392; 49 L.J.M.C. 49; 42 L.T. 439.
- (17) *Ex p. May* (1862), 2 B. & S. 426; 18 Digest 399, 1395; 31 L.J.M.C. 161. C
- (18) *Liverpool Corpn. v. Hope*, [1938] 1 K.B. 751; [1938] 1 All E.R. 492; Digest Supp.; 107 L.J.K.B. 694; 158 L.T. 215.
- (19) *R. v. Bell, R. v. Shackle* (1823), 11 Price, 772; 16 Digest 229, 213.
- (20) *R. v. Cotton* (1751), Park. 112; 18 Digest 343, 789.
- (21) *Stevens v. Evans* (1761), 2 Burr. 1152; 18 Digest 396, 1377.
- (22) *Fourth City Mutual Building Society v. East Ham (Churchwardens & Overseers)*, [1892] 1 Q.B. 661; 18 Digest 399, 1396. D
- (23) *R. v. Hedges* (1840), 11 Ad. & El. 163; 16 Digest 367, 2005; 10 L.J.Q.B. 6.
- (24) *Vinkinstone v. Edden* (1698), 1 Ld. Raym. 384; 18 Digest 427, 1650.
- (25) *Lee v. Lopes* (1812), 15 East, 230; 5 Digest 829, 7041.
- (26) *Dixon v. Smith* (1818), 1 Swan. 457; 18 Digest 343, 792.
- (27) *Greaves v. D'Acastro* (1725), Bunb. 194; 18 Digest 347, 840. E
- (28) *R. v. Southby and Etchings* (1715), Bunb. 5.

APPEAL by Potts against a judgment of the Court of Appeal (SCOTT, CLAUSON and GODDARD, L.JJ.), dated July 25, 1939, and reported *sub. nom. Hickman v. Potts*, [1939] 3 All E.R. 794, where the facts are fully set out. F

R. M. Montgomery, K.C., and *G. D. Squibb* (for *G. E. P. Thorneycroft* on war service) for the appellant.

A. T. Denning, K.C., and *Robert Fortune* for the respondent.

VISCOUNT SIMON, L.C.: My Lords, the remarkable feature of this appeal is that the question it raises has never been raised and decided before. The occupier of a house in Wolverhampton was behindhand both with his rent and with the payment of his rates. When the appellant, as bailiff for the corporation, levied for the rates on the occupier's goods and chattels under a warrant of distress, which had been granted by two justices of the peace for the borough, the respondent, as landlord of the premises, gave notice to the appellant claiming that the rent then due and payable constituted, under the Landlord and Tenant Act, 1709, s. 1, a first claim on the proceeds of sale. This claim was resisted, and in the Wolverhampton County Court His Honour G
H

JUDGE TEBBS dismissed it as unfounded. The Court of Appeal took a different view, and held that the landlord's claim was justified. We now have to decide which view is right.

The Poor Relief Act, 1601, authorising the levying of distress for poor rates, and the Landlord and Tenant Act, 1709, "for the better security of rents, and to prevent frauds committed by tenants," which requires an execution creditor to pay to the landlord certain arrears of rent in priority to levying execution upon the tenant's goods and chattels, have lived side by side for over 230 years. Hitherto, no one—text-writer, litigant, or judge—has ever suggested that the latter statute controlled the former—i.e., that the exaction of unpaid rates by means of a distress warrant was subject to the condition that the rating authority should first provide for unpaid rent due to the landlord. Comprehensive digests of the law of rating and of the law of landlord and tenant respectively, with every case noted, are on the shelves of every law library, but nowhere in either class of work is the suggestion to be found that the law of rent and the law of rates impinge at this point. Neither, so far as can be ascertained, is past or present practice in accordance with the contention of law now put forward by the respondent. Nevertheless, if, upon its proper construction, the Landlord and Tenant Act, 1709, authorises and requires that this contention should be accepted, accepted it must be, and past failure to appreciate the true operation of the statute does not affect the conclusion at all.

The House has been much assisted by the learning and research of counsel on each side, and we further have the advantage of the full and carefully reasoned judgment of GODDARD, L.J., delivered on behalf of the Court of Appeal. If the test which would determine the present controversy were completely stated by asking whether the lawyers of 1709 would have regarded the levying of a distress for rates as an execution, there would indeed be a great deal to be said for the conclusion of GODDARD, L.J. Ten years before the Landlord and Tenant Act, 1709, was passed, HOLT, C.J., had said in the deer-stealing case, *R. v. Speed* (1), at p. 330 :

When a statute says money "shall be levied by distress," this is an execution.

In *Hutchins v. Chambers* (2), where the question was whether beasts of the plough were privileged from distress for poor rates and it was decided that they were not, LORD MANSFIELD, C. J., at p. 588, quotes with approval the following passage from 3 Salk., at p. 136 :

... this common law exemption of utensils, tools, instruments of husbandry, etc., from distress, holds only in distress for rent-arrear, amerciaments, etc., but doth not extend to cases where a distress is given in the nature of an execution, by any particular statute ; as for poor rates . . .

Therefore, adds LORD MANSFIELD, C.J., it is more analogous to an execution than to a distress at common law, and there (in cases of execution) *averia carucæ* may be distrained, although there may be other sufficient distress.

At the end of the eighteenth century yet another chief justice affirmed the analogy. In *R. v. Benn & Church* (3), LORD KENYON, C.J., said that a warrant of distress for poor rates was "in the nature of an execution."

If, however, all that was necessary to bring distress for rates within the scope of the Landlord and Tenant Act, 1709, was to realise that distress for rates might be regarded as "in the nature of an execution," why has the enforcement of payment of rates by distress warrant gone on to this day without regard to the landlord's claim for rent overdue? The answer is that the decisive question is not whether distress for rates can be regarded as a form of execution, but whether it should be regarded as execution within the meaning of the Landlord and Tenant Act, 1709, s. 1. It is the language of the section (which is far from being well drawn, according to modern standards), and not the abstract question whether certain forms of distress approximate to execution, which must determine the issue. Sect. 1 provides as follows:

For the more easy and effectual recovery of rents reserved on leases for life or lives, term of years, at will or otherwise; Be it enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in Parliament assembled, and by the authority of the same, That from and after May 1, 1710, no goods or chattels whatsoever, lying or being in or upon any messuage, lands or tenements, which are or shall be leased for life or lives, term of years at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall before the removal of such goods from off the said premisses, by virtue of such execution or extent, pay to the landlord of the said premisses or his bailiff, all such sum or sums of money as are or shall be due for rent for the said premisses at the time of the taking such goods or chattels by virtue of such execution; Provided the said arrears of rent do not amount to more than one years rent, and in case the said arrears shall exceed one years rent, then the said party, at whose suit such execution is sued out, paying the said landlord or his bailiff, one years rent, may proceed to execute his judgment, as he might have done before the making of this Act; and the sheriff or other officer is hereby impowered and required to levy and pay to the plaintiff as well the money so paid for rent, as the execution money.

The words of the section indicate that the sort of execution which it contemplates should fulfil these conditions. (i) It must have been "sued out" by a "party." (ii) After providing for the prescribed arrears of rent, "the said party, at whose suit execution is sued out . . . may proceed to execute his judgment." (iii) The process, when executed by the "sheriff or other officer," should result in payment "to the plaintiff" of the "execution money."

This phraseology is entirely suitable to the execution of a writ of *fi. fa.* In *Henchett v. Kimpson* (4), PRATT, C.J., said, with reference to the word "plaintiff" in the last limb of the section [p. 141]:

. . . the statute shall have a liberal construction, and the words "party at whose suit the execution is sued out" shall be construed to mean either plaintiff or defendant, whose judgment and execution it is.

What is contemplated is that the successful party in a litigation who has obtained judgment follows this up by "suing out" execution upon his judgment for the amount of money so awarded—i.e., the "execution money." The proceedings are contemplated as composed of two steps

in succession, the first ending in judgment between the parties for a sum of money (damages or costs, or both), and the second consisting in the successful party enforcing his judgment by execution. The distinction between these two steps is made plain in *Altham's Case* (5), at p. 153*b*. What is essential is that there should have first been a judgment *inter partes* on the basis of which execution can be sued out. An example of the distinction is furnished by *Brandling v. Barrington* (6), where goods upon a farm were seized by the sheriff, by virtue of a writ of *pone per radios* issued out of the Court of Pleas at Durham to compel appearance, and, upon default of appearance by the occupier, were assigned by order of the bishop to the party at whose suit the writ had been issued in satisfaction of his damages. The landlord brought an action against the sheriff charging him with having removed the goods from the farm without having paid to the landlord six months' rent then due. LORD TENTERDEN, C.J., held that the plaintiff was not entitled to recover, as the process under which the sheriff seized and sold the goods was not process of execution on a judgment.

If we apply these tests to a distress warrant for poor rates, it appears to me to be clear that such a distress is not an execution within the scope of the Landlord and Tenant Act, 1709, s. 1. In the case of rates, there is no previous judgment *inter partes* before the execution is applied for. The liability of the occupier to pay the sum at which he is assessed for rates is not due to an action as the result of which he has been adjudged to pay the amount. Rates, indeed, cannot be recovered by action: *Seaman v. Burley* (7), at p. 347. It is the making of the rate and the assessment of the occupier which constitute liability, though, even after distress, the occupier has the opportunity of challenging liability by action of replevin—which itself is inconsistent with the notion that the process is collecting “execution money” as the result of a “judgment” in favour of a successful “party.”

I agree with GODDARD, L.J., that justices, when granting a distress warrant for rates, are proceeding judicially. They have to be judicially satisfied that the rate has been duly made and published, and that the person summoned has been duly rated and has not paid. The Poor Relief Act, 1601, does not contain a provision requiring the alleged offender to be first summoned before the justices, but, at any rate from the beginning of the eighteenth century, there are decisions which point out that, if he is not first given an opportunity of explanation, this would amount to punishing him unheard. Thus, four years before the Landlord and Tenant Act, 1709, was passed, HOLT, C.J., had before him *Tracy v. Talbot* (8). It is very briefly reported in 2 Salk. 532, but in BURN'S JUSTICES OF THE PEACE, Vol. 4, *sub voce* “Poor,” at p. 354, there is a passage from the judgment of HOLT, C.J., as follows :

The rate cannot be distrained for by virtue of a general warrant made before the rate : but there ought to be a special warrant on purpose ; that is to say, the non-feasance of the party shall not be left to the judgment of the officer, who may, out of private resentment, sell his neighbour's goods without sufficient cause ; but

oath of the refusal must be made before the justices. And it is reasonable that the party should be heard in his defence; for he may show cause variously why a distress should not be granted; as that the rate was not regularly allowed, or was not published in the church, or that he had given notice of appeal, or that no demand or refusal had been made, and the like.

A much later decision, which shows how strongly the view was held that the alleged defaulter must first be summoned, is that of the Court of King's Bench in *R. v. Stafford JJ.* (9). By a local Act for paving the town of Stafford commissioners were authorised to make rates, and, in case any person rated should neglect to pay his rates for 7 days after demand, it should be lawful for any justice, upon proof on oath of such demand and non-payment, by warrant to authorise the collector to levy the rate by distress and sale, and, in case there should be no distress, to commit the party to gaol. The magistrates refused to issue a distress warrant without previously issuing a summons to the party of whom complaint was made. A *mandamus* was applied for to compel the justices to issue their warrant without any previous summons, but the *mandamus* was refused, and it was refused on the ground that the case was exactly analogous to that of poor rate. LORD DENMAN said that it was impossible to distinguish the private Act from the Poor Relief Act, 1601, and that in both cases :

... the magistrates should issue a summons, not by way of exercising any authority over the rate, but, admitting the rate to be valid, to call on the party to show cause why his proportion of it is unpaid.

Later, PATTESON, J., said, at p. 99 :

The Poor Relief Act, 1601, s. 4, is analogous to the clause in this Act, and it has been held that before the magistrates issue a distress warrant for a poor rate they should summon the party.

Also LITTLEDALE, J., said in *Brandling v. Barrington* (6) :

I cannot distinguish this Act from the Poor Relief Act, 1601.

It seems to me, therefore, that the decision in *R. v. Stafford JJ.* (9) amounts, whether rightly or wrongly, to an interpretation of the Poor Relief Act, 1601, to the effect that a summons should precede the warrant. The requirement of proceeding by summons is now, of course, laid down by the Distress for Rates Act, 1849. However, while the justices act judicially in granting a distress warrant for rates, and although they give the alleged offender the opportunity of being heard, their conclusion, as I have indicated above, ought not to be regarded as a judgment *inter partes*. The distress warrant, albeit "in the nature of an execution," is not a process to enforce payment of a debt ascertained by a previous judgment. The duty to pay rates does not depend on an adjudication between litigants, but upon the making of the rate by the rating authority.

In the course of the argument, consideration was given to the reference in the Landlord and Tenant Act, 1709, s. 1, to "extent." The reference is faulty, for, if "extent" was to be mentioned at all, it ought

to be first mentioned earlier in the section. The writ of extent is a remedy to recover debts of record due to the Crown, and, inasmuch as sect. 8 of the statute expressly excludes from its scope any levying, recovering, or seizing of Crown debts, it is not easy to see the usefulness of the reference to "extent" in sect. 1. Of the two kinds of extent,

- A extent in chief would be plainly excluded by sect. 8, but there was also a process known as extent in aid, which issues at the suit of a Crown debtor against a person indebted to himself. It was decided, however, by the Court of Exchequer in *R. v. De Caux* (10) that a landlord had no right to claim rent from the sheriff who had seized goods under an
- B extent in aid, since this too was an exercise of prerogative power, and it was said, at p. 18 :

As to the word *extent*, used in the clause, that might be satisfied by applying it to such as were of a private nature . . .

- C The reference appears to be to writs in the nature of extents, which were formerly issued as writs of execution for private persons in order to obtain satisfaction of a debt due on recognisances or debts acknowledged on statutes merchant or statutes staple. Blackstone in his COMMENTARIES (Vol. 3, p. 420) gives this as one of the five forms of execution available in actions where money is recovered as a debt or
- D damages. Whatever be the reason for including a writ of extent in the Landlord and Tenant Act, 1709, it does not appear to me that this circumstance enlarges the conditions which must be fulfilled by executions properly so called if they are to comply with the language of the section.
- E Neither does the phrase in the section "any execution on any pretence whatsoever" operate to enlarge the meaning of "execution" if the conditions of the section are to be satisfied. It may well be that the phrase is to be explained by recalling the words of TINDAL, C.J., in *Taylor v. Lanyon* (11), at p. 544, that the Landlord and Tenant Act, 1709 :

- F . . . was passed to protect the landlord against frauds which might be committed by his tenants, particularly by those colluding with creditors to issue writs of execution ; for property so in the custody of the law could not be distrained, and the judgment creditor, by keeping possession for a length of time, might seriously affect the interests of the landlord.

- G If such is the purpose of the statute, then there would be no point in including distress for rates as one of the forms of execution, the operation of which is postponed to the landlord's rights, for occupiers could hardly act in collusion with rating authorities for the purpose of defrauding landlords of their rents. I move that this appeal be allowed with costs
- H here and in the Court of Appeal, and that the county court judge's judgment in favour of the appellants with costs be restored.

VISCOUNT MAUGHAM : My Lords, the respondent is the owner of premises, No. 366, Dudley Road, Wolverhampton, which were let to Miss Mary Ann Townsend at the rent of £5 7s. per quarter. The Rent

and Mortgage Interest Restrictions Acts, 1920 to 1933, applied to the premises. Miss Townsend fell into arrears with her rent, and on Aug. 10, 1938, leave was granted to the respondent to levy a distress for rent amounting to £13 10s., suspended so long as Miss Townsend paid 15s. per week off the arrears and a quarter's rent when due. After two payments, she made default, and on Sept. 29, 1938, the sum of £15 11s. A was due and payable by her to the respondent. Unfortunately, she was at the same time unable to pay the rates and water rent in respect of the same premises to the rating authority, the mayor, aldermen and burgesses of the county borough of Wolverhampton. The amount payable was £6 5s. in respect of rates, and 19s. 3d. for water rent, which, B by the local statutes, is recoverable in the same manner as rates.

After a complaint duly made by the rating authority to a justice of the peace of the borough, a summons was served on Miss Townsend, and on Aug. 11, 1938, a distress warrant in the form prescribed by the Distress for Rates Act, 1849, was addressed : C

. . . to the rating authority for the county borough of Wolverhampton and to the constables and other peace officers of the said county borough.

By this warrant, after the usual recitals, it was commanded in His Majesty's name that distress of the goods and chattels of the persons named in the schedule should forthwith be made, and, in default of D payment within five clear days of the sums set opposite the names of such persons, together with the reasonable charges of taking and keeping the said distress, that then the goods and chattels of the person so making default should be sold, with the necessary consequential directions. The name and the residence of Miss Townsend were stated in E the schedule, and also the sums abovementioned, making the total of £7 10s. 4d.

The appellant, who is an auctioneer by profession, and the duly appointed agent and bailiff of the rating authority, on Sept. 20, 1938, levied a distress on the goods and chattels of Miss Townsend at F 366, Dudley Road. This was done on instructions received from the rating authority and in pursuance of the distress warrant. On Oct. 4, the appellant received notice from the solicitors of the respondent that the sum of £15 11s. was due to her for rent of the premises, and that she had obtained leave to distrain for that sum. They accordingly claimed G payment of that amount. The appellant sold the goods and chattels seized by him by public auction on the premises on Oct. 11, 1938. They realised the sum of £6 5s. 6d., which it is admitted was their true value. The appellant had incurred costs in connection with the distress to the amount of 6s. 1d. before he had received notice of the claim for rent. H The appellant declined to pay the rent or any part of it to the respondent. Proceedings were then commenced in the Wolverhampton County Court by the respondent against the appellant. The county court judge held that the Landlord and Tenant Act, 1709, s. 1, did not apply, since the distress was not, in his opinion, an execution within that section. On

appeal to the Court of Appeal (SCOTT, CLAUSON and GODDARD, L.JJ.), a different view was taken, and, in a very clear and lucid judgment delivered by GODDARD, L.J., it was held that the distress warrant was an execution of the judgment of the two justices who authorised it. They accordingly allowed the appeal and ordered judgment to be entered

A for the respondent for the sum of £4 12s. 6d. (agreed damages and costs of action) and the costs of appeal. Leave to appeal was given.

My Lords, it is evident that the amount involved is lamentably small, and I cannot help expressing my regret that it was not found possible to make further concessions to the unlucky tenant, and thus to save a

B much larger sum in costs, but the question involved is of considerable public interest and importance. It is, moreover, stated that each side has, or has had, the support of an appropriate association. The question which arises is as to the true construction of the Landlord and Tenant Act, 1709, s. 1, which I shall call the statute of Anne—namely whether

C the levying of a distress for rates under a justices' warrant is an "execution" within the meaning of that section. It is a fact, though for my part I am not disposed to lay too great stress upon it, that for two hundred and thirty years the contrary view has apparently obtained throughout the legal profession, with the consequence that no landlord

D has hitherto claimed to be entitled to the benefit of the section at the expense of the rating authority. At any rate there is no report of any such attempt, though there are a number of reported cases dealing with other points arising under the section. My feeling that this sleeping dog might well have been allowed to lie for another century or two has

E been mitigated by the circumstances that the question is one of considerable legal interest and that it has been admirably argued on each side.

I will not repeat the terms of sect. 1 of the statute of Anne, which have just been stated, but it may be useful to say a word as to the

F position of the landlord as regards execution on a judgment such as execution on a writ of *fiery facias* before the statute of Anne was passed. The goods seized by the sheriff as from that moment, and (if and when there was a sale) for a time after the sale sufficient to enable the purchaser to remove the goods, were considered as being *in custodia legis*,

G and, therefore, exempt from distress by the landlord: GILBERT ON DISTRESS, 3rd Edn., p. 40, and see also the opinions of the judges in *Giles v. Grover* (12). A writ of execution, it will be remembered (with exceptions immaterial for the present purpose), is a command by the King to an officer of great antiquity—namely, the sheriff—in an ancient

H form, and it is "tested" in the name of the Lord Chancellor. The writ must be executed by the sheriff or the under-sheriff or by the bailiff, (whether a bound bailiff or a special bailiff), an officer whose authority is a warrant addressed to him by name by the sheriff or the under-sheriff. The main trouble of the landlord before the statute of Anne was that, as pointed out by VISCOUNT SIMON, L.C., the tenant, if he could

get a friend to commence a collusive action and then to put in the sheriff, was able to defy the landlord so far as his remedy by distress was concerned: *Taylor v. Lanyon* (11), at p. 544. It was partly, at any rate, to remedy this mischief that the statute of Anne was passed. This statute, as pointed out by LORD LINDLEY, M.R., in his judgment in *Re Mackenzie, Ex p. Hertfordshire (Sheriff)* (13), at p. 574, did not give the landlord a right to distrain if the sheriff had seized, but it prohibited the removal of the goods seized by him until the landlord's rent in arrear (not exceeding one year's rent) had been paid by the execution creditor. The curious results which followed from this method of protecting landlords are stated in the judgment of LORD LINDLEY, M.R., and I will not repeat what is there explained in such clear language; but it is useful to remember that, unless the execution creditor (or the tenant) paid the landlord his rent in arrear, the Act would often produce a deadlock. The sheriff could not be compelled by the landlord either to sell the goods or to withdraw from the premises. Ultimately, it became the regular practice for the sheriff to sell or to deliver the goods and to pay the landlord out of the proceeds, but this, strictly speaking, was illegal.

My Lords, in an endeavour to answer the question which lies before us we must put out of our minds statutes passed after 1709, and we must be careful, in applying later decisions of the courts, to see that they would probably have been the same in that year. It is, moreover, clear that the question is not as to the general meaning of the word "execution" in 1709, but as to its particular meaning in sect. 1 of the statute of Anne. The first observation I shall make is that there was no special reason in 1709 for protecting landlords in a parish, who would generally themselves be ratepayers, against distress warrants for rates granted by two justices of the peace for the benefit of the parish. It cannot be supposed that such distresses, which, according to the Poor Relief Act, 1601, had necessarily to be followed by sale of the goods, could be put in for the purpose of protecting the tenants. We ought not, therefore, to approach the problem before us with the notion that the legislature, when using the word "execution" in the section, was deliberately intending by the word to include any distress authorised by statute. Such words as "or other process, warrant or authority" might easily have been added to the word "execution," as in fact they were in the Act 43 Geo. III, c. 99, s. 37. It is, however, the language of the statute of Anne which mainly requires examination. We find there that the execution is one "sued out by a party," that that party is to pay the rent due to the landlord (not exceeding one year), that he may then "execute his judgment," and that "the sheriff or other officer" is empowered "to levy and pay to the plaintiff the money paid for rent and the execution money." It may be mentioned here that it was held in *Henchett v. Kimpson* (4) that the reference to a plaintiff should be construed to include "either plaintiff or defendant whose

judgment and execution " it was, with the result that a defendant putting in an execution for costs awarded to him was held bound by the provisions of the statute. That, however, does not, I think, affect the present question.

- My Lords, it is clear, I think, and Coddard, L.J., accepts that view, A that the statute of Anne is dealing only with executions under a judgment, since there must be a party at whose suit execution is sued out, and he is to be a person entitled to "execution money." As Lord Tenterden, C.J., remarked in *Brandling v. Barrington* (6), at p. 475 : . . . the plain sense of the words is confined to execution on judgments.
- B It was on that ground that the court held in that case that goods taken under the now obsolete writ of *pone* by the sheriffs of the County Palatine of Durham, though what was done had "the effect of an execution," was not in fact an execution under a judgment, since it was issued, like the writ of *distringas*, for the purpose of compelling an appearance. We may thus formulate the question in this form. Was the C warrant of distress for rates in 1709 a process of execution on a judgment ? The section contemplates that there will be a plaintiff or a defendant, and it seems, therefore, that the judgment must be *inter partes*. The position of the churchwardens and overseers of the parish in the reign D of Queen Anne was very different in some respects from that of a plaintiff in an ordinary action. The latter could, of course, pay the landlord his rent if he had the necessary money, but it is not very clear that the churchwardens and overseers had authority to make such payment out of the rates which they had collected from others in the parish.
- E Assuming this difficulty to be got over, it is desirable to examine the nature of the poor rate and the means for recovering the sums assessed. The foundation of the liability to pay rates is to be found in the Poor Relief Act, 1601. By sect. 2 of that Act, provision is made for the making of a rate and for the recovery of rates which are unpaid. It F is there provided that it shall be lawful for the churchwardens and overseers of the parish :

. . . by warrant from any two such justices of the peace . . . to levy as well the said sums of money and all arrearages of every one that shall refuse to contribute according as they shall be assessed by distress and sale of the offender's goods . . . rendering to the parties the overplus.

- G It is to be noted that there is no direction in the Act that a summons should be issued before the distress warrant is granted by the justices, and for a great many years it was not, I think, the law that such a summons was necessary, though it appears to have become usual in some parishes to summons the party in default as to the rate. What H was necessary was to prove to the justices, in the words of the statute, that the party concerned, the "offender," had "refused to contribute," and it was only by gradual steps that a summons became a necessary step in the obtaining of a warrant. It may be difficult to ascertain with certainty the procedure of justices in 1709 in relation to a warrant of distress for rates pursuant to the Poor Relief Act, 1601, but I think

there is no doubt about the practice for many years after that statute, because the actual forms in use are contained in SHEPHARD'S JUSTICE OF PEACE, published in 1660. In Chapter VI of that work, we find the form of warrant appointing persons to be overseers of the poor of a parish according to the Act of Parliament, and then (p. 34) we find the form to be used to enable a distress for the poor rate to be made. It A
is not uninteresting, and I will here state it :

W. S. and L. S., esquires, two of the justices of the peace of the county of Gloucester. To the churchwardens and overseers of the poor of the parish of D. in the county of G. Whereas the persons here undernamed, all of your parish of D., have been duly assessed the sums of money hereunder at their names appearing and set down and rated upon them towards the maintenance and relief of the poor of your parish, the which rate hath been duly confirmed by two of the justices of the peace of the said county, according to the form of the statute in that case provided. The which sums they are in arrear, and refuse to pay, although the same have been demanded of them. These are therefore to authorise and require you once more to demand the said several sums of the said several persons respectively : B
And in case they refuse to pay the same, that then you levie it by way of distress and sale of the goods and chattels of the persons refusing to pay the same respectively, rendering to them the overplus according to the said statute. And that you the same money pay and distribute to the use of the poor of your parish according C
to your office. And hereof, etc.

There are other precedents of warrants in the book showing that summonses to appear before the justices before making orders to distrain, or even to commit to prison, were not in all cases thought to be necessary in 1660. It must be remembered that at that date, and, indeed, D
till many years later, justices of the peace who issued a wrongful warrant of distress were liable to be sued by the injured party (Poor Relief Act, 1601, s. 18, *Harper v. Carr* (14) and the Constables Protection Act, 1750). The justices had good reason for being careful in such a matter. E
I do not doubt that the obviously just and prudent course of summoning a person refusing or neglecting to pay the poor rate was creeping in, and that, by the end of the eighteenth century, as the result of the decisions in *R. v. Benn & Church* (3) and *Harper v. Carr* (14), which are cited by GODDARD, L.J., it was settled that a summons should precede a warrant of distress, which, as LORD KENYON, C.J., observed, was "in the nature F
of an execution." The law was previously in a state of doubt. I do not read the statement of HOLT, C.J., in *R. v. Speed* (1), as cited by my noble and learned friend VISCOUNT SIMON, L.C., as deciding that a summons must precede a warrant, but rather that such a course should G
be taken as was directed in *R. v. Benn & Church* (3). In *R. v. Middlesex JJ.* (15), LEE, C.J., presiding in the King's Bench, observed that there was no direction in the Poor Relief Act, 1601, s. 4, that the defaulting party should be summoned to show cause. In *R. v. Benn & Church* (3), an application for a *mandamus* to the justices, where there H
had been no summons, was at first refused by LORD KENYON, C.J., who said that he could not agree with LEE, C.J., but on the following day there was a second application for a *mandamus* by counsel. He stated and apparently produced many precedents of

... similar writs [of *mandamus*] which neither stated the parties to have been summoned, nor required the justices to summon them.

Upon this the court granted a mandamus to the magistrates (which it had previously refused to do)

“to receive such informations and complaints as have been or shall be duly laid before them against such persons as have neglected or refused, or shall neglect or refuse, to pay the sums respectively assessed on them . . . and to proceed thereupon to levy the said several sums.”

- A The italics are mine. The court did not, in the result, insist on a summons as a condition for granting a warrant of distress, though it required the justices to consider the informations and complaints.

I have also examined such early books as I can find on the poor laws, and in particular CARTER ON POOR LAWS, 1710, and FOLEY ON

- B LAWS RELATING ON THE POOR, 1739, and I cannot find any statement or suggestion that a summons was necessary when those books were written. My Lords, I have made some other researches, but I am unwilling further to take up your Lordships' time with a discussion of this point of ancient and obsolete law. All I am concerned to do is
- C to give reasons for thinking that in 1709 there was not, in the view of lawyers, so far as that can now be ascertained, a summons or anything resembling a judgment *inter partes* which must have preceded a warrant for the issue of distress for unpaid rates. However, even if there was a summons prior to the warrant, it would not, in my opinion, be a
- D correct conclusion that the decision on the summons was such a judgment as the statute of Anne was dealing with. The justices, no doubt, on such a summons would have to be satisfied on certain matters, but, if so satisfied, they had no discretion, and were bound to grant the warrant. In *R. v. Price* (16), COCKBURN, C.J., remarked, at p. 301 :

- E In granting a distress warrant for a rate justices act ministerially under the Poor Relief Act, 1601, s. 4, and not as a court of summary jurisdiction.

A little later, he added that the money due for the rate was [p. 301]

. . . not recoverable through an order of a court of summary jurisdiction. The rate itself is the order.

- F The first statement, I think, required a little amplification, and in *Ex p. May* (17) COCKBURN, C.J., said, at p. 428, that the justices have to see that there is such a rate as alleged, that the party summoned is named in the rate, and that he has not paid, “after which their duty is simply ministerial.” BLACKBURN, J., added that they have also to inquire
- G whether the defendant is the occupier, but, subject to that addition, he appears to have agreed. The true view, according to that case, seems to be that the justices have to be satisfied on certain questions of fact which are generally free from difficulty, but that, subject to being so satisfied, they have no discretion, and act ministerially. If
- H that is correct, and I think it is, it would seem to follow that the justices are performing a somewhat special and a mixed function in granting a distress warrant, and, in my opinion, it is straining the language of the Act of 1709 to call the decision of the justices a judgment *inter partes*. It is still more difficult so to describe it if we accept the view, as, in my opinion, we must, that there is no judgment for the amount

of the rate and no legal debt recoverable by action. As COCKBURN, C.J., observed in *R. v. Price* (16), "the rate itself is the order." There is a passage in a judgment by LORD ESHER, M.R., in *Seaman v. Burley* (7), at p. 347, which points in the same direction. Finally, it has recently been held in the Court of Appeal (SLESSER, SCOTT and CLAUSON, L.JJ.) that a local authority cannot sue a ratepayer either A for money due or for breach of a statutory duty: *Liverpool Corp'n. v. Hope* (18). A rate, it was held, is not a common law liability, but a mere creature of statute, and the only remedy is the statutory remedy by distress. It follows that the justices were bound at and prior to 1709 to issue the distress warrant if certain facts were proved, and that B there was no judgment of any court that any money was due by the ratepayer, nor was there any debt recoverable by action. There remains the circumstance that the execution is to be levied by "the sheriff or other officer," who is given a special power to levy the money paid for rent as well as the execution money. I am not satisfied that the bailiff C of the rating authority is within those words, according to their natural meaning. Such a bailiff is only the agent of the rating authority. He holds no "office," and his position in the matter is very different from that of a sheriff, an under-sheriff or his bailiff, as above explained. The expression "sheriff or other officer" is generally used to denote the D sheriff or other officers deriving their authority under him. I do not know any sufficient reason for extending the meaning of the phrase "sheriff or other officer" so as to include an agent appointed by a rating authority.

Some stress was laid by counsel for the respondent on the E reference to extents in sect. 1 of the statute of Anne. The word requires some explanation, for the writ of extent was a writ of execution against the goods (and the lands) of a Crown debtor for enforcing payment of debts due to the Crown, and the rights of the Crown are saved by sect. 8 of the Act. There were, however, also writs of "extents in aid" issued F against the debtor of a person himself a Crown debtor, and they were issued at the suit of the Crown debtor in the name of the Crown: *R. v. Shackle* (19) and *Giles v. Grover* (12), at pp. 128, 129. Crown debtors discovered that by an extent in aid they could more conveniently collect their own private debts, and a stop was put to this practice by the G Extents in Aid Act, 1817, which precluded private debtors recovering more than was due by them to the Crown. The statute of 1709 contained in sect. 8 a proviso that nothing therein should prejudice Her Majesty in the recovery of any debts, fines, penalties or forfeitures due or payable to her, but it may have been thought that this would not H have affected extents in aid, since the sums recoverable by those writs would not be due or payable directly to the Crown. An extent was certainly a writ of execution, though usually preceded by a *scire facias*, which enabled the debtor to dispute the existence of the debt, and a special procedure was applicable to it. It seems possible that the

draftsman inserted the word "extent" in sect. 1 of the Act of 1709 in order to ensure that extents in aid issued at the suit of private persons should be under the same obligation to the landlord as other execution creditors. This endeavour seems to have been unsuccessful (*R. v Cotton* (20) and *R. v. De Caux* (10)), but the insertion of a reference to
A extents in the section does not, I think, outweigh the other considerations which tend to show that distress warrants are not included in the word "execution."

My Lords, I do not doubt that a distress warrant for rates is analogous to, and in some respects is, an execution, nor that in an appropriate
B setting it might well be included in the word "execution." My conclusion that it is not used in the wider sense in sect. 1 of the statute of Anne is formed on a consideration of the surrounding circumstances in 1709 and of a number of indications in the section itself. In particular,
C I have reached my conclusion mainly on the following grounds. First, the section is dealing only with executions on judgments in proceedings *inter partes*. Secondly, in the case of a distress for rates, there is, or at any rate there was in 1709, no such judgment involved. Thirdly, a bailiff appointed by churchwardens and overseers to distrain for rates in 1709 was not within the words "sheriff or other officer" in their
D ordinary meaning. Fourthly, if we consider the mischief which the statute of Anne was intended to remedy, there exists no reason for a strained interpretation of the section for the benefit of landlords. Lastly, for over two centuries the legal profession seems to have accepted the more limited view of the meaning of the word "execution" in the
E section. On these grounds, I think the appeal should be allowed, and I concur with the proposed motion.

LORD THANKERTON: My Lords, I concur in the motion proposed and in the reasons stated by my noble and learned friend VISCOUNT
F SIMON, L.C.

LORD WRIGHT: My Lords, the decision of this appeal depends on the true construction of the Landlord and Tenant Act, 1709, s. 1. The question is whether the benefit which this section granted to landlords
G in giving priority to their distress for rent goes beyond a priority over writs issued to execution creditors under judgments of the High Court and extends to a priority over a distress warrant granted by justices to a rating authority in respect of arrears of rates. In short, is the levying of distress for rates under a justice's warrant an execution within
H sect. 1 of the Act? The county court judge decided against the landlord's claim, but his decision was reversed by the Court of Appeal.

The facts are sufficiently before your Lordships, as also are the exact words of sect. 1 of the Act. The distress warrant in this case followed the statutory form provided by the Distress for Rates Act, 1849. That Act fixed the procedure for giving effect to the provisions of the Poor

Relief Act, 1601, s. 3, under which overseers by warrant from any two justices of the peace were entitled to levy by distress and sale of the offender's goods unpaid arrears of rates. The Rating and Valuation Act, 1925, s. 2 (3), preserved the existing method of levying, collecting and receiving the poor rate and applied it to the general rate prescribed by the Act. The statutory form of warrant as used in this case is included in the statement of facts, and is not without significance. It was addressed to the rating authority of Wolverhampton and to the constables and other peace officers, and recited a complaint by the rating authority made to a justice that certain persons, including the respondent, having been duly rated and assessed to the rate, had not paid, but had refused. It also recited that they had been duly summoned to appear before two of the justices to answer the complaint, that it had been proved that the general rate had been duly made and published, that the respondent had been duly rated and assessed but had refused to pay the sum though duly demanded, and had not shown sufficient cause for not paying. The warrant in His Majesty's name commanded the rating authority to make distress of the respondent's goods, and, if the rates were not paid within five days, to sell the goods and chattels, retaining enough to pay the sum demanded for rates and rendering the overplus to the respondent, and, if no sufficient distress were found, to certify the same to the justices, who had then power to commit the defaulter. The amount of the general rates was £6 5s., with 6s. 1d. for costs. The goods realised £6 5s. 6d. The respondent had claimed to levy a distress for arrears of rent amounting to £15 11s., and brought the action in the county court for £15 11s. as damages against the defendant, who, as bailiff for the rating authority, had levied the distress under the warrant, but had not paid it to the plaintiff to satisfy *pro tanto* arrears of rent. They denied that sect. 1 of the Act of Anne applied.

In my opinion, in cases of this class, the order made by the justices is made in a judicial proceeding. That it is a judicial proceeding was held in *R. v. Benn & Church* (3) and in *Harper v. Carr* (14). These cases, in my opinion, disposed of a difficulty which had been felt as to whether a party against whom a distress warrant was sought should first be summoned so that he could be heard in his defence. The Act of 1601 contained no specific requirement that he should be summoned, though it did provide for distress and sale of the offender's goods, and, if no sufficient distress was found, empowered the justices to commit the offender. However, in 1705, four years before the Act of 1709, HOLT, C.J., had stated specifically that the party should be heard in his defence. That was in *Tracy v. Talbot* (8). All the reports quote HOLT, C.J., as laying down that the rate could not be distrained for by virtue of a general warrant made before the rate, but that there ought to be a special warrant for the purpose. This seems to show sufficiently that the justices had to decide judicially on the case of the

particular person charged with default; but BURN ON JUSTICES OF THE PEACE, a work of the highest authority, first published in 1755, some account of which and of the author is given by HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. XII, p. 332, goes on to quote more fully how HOLT, C.J., proceeded in the course of his ruling. He observed:

- A That is to say, the nonfeasance of the party shall not be left to the judgment of the officer who may out of private resentment sell his neighbour's goods without sufficient cause; but the oath of the refusal must be made before the justices. And it is reasonable that the party should be heard in his defence; for he may show cause variously why a distress should not be granted; as that the rate was not regularly allowed or was not published in the church, or that he had given notice of appeal, or that no demand or refusal had been made and the like.
- B In that case, HOLT, C.J., did not specify any particular procedure to secure that the alleged defaulter should be given an opportunity of being heard, but it seems that before 1746 a custom had grown up to issue to the alleged offender a summons for that purpose. In *R. v. Middlesex JJ.* (15), justices had refused to grant a distress warrant for rates till the party had been summoned, on the ground, it was stated, of a custom to that effect. The Court of King's Bench, under LEE, C.J., granted a *mandamus*, apparently on the ground that the Poor Relief Act, 1601, did not specify a summons as necessary. In 1761, however,
- C WILMOT, J., in *Stevens v. Evans* (21), emphasised the established rule of the common law by observing, at p. 1159, that "it would be strange, that a distress should be taken upon a man's goods without hearing him," and in 1795 LORD KENYON, C.J., held expressly in *R. v. Benn & Church* (3) that a summons must precede a warrant of distress,
- D adding, at p. 198:
- E

On the summons, the party may show a sufficient reason to the magistrates why a warrant of distress should not issue . . .

- F That the granting of the distress warrant was a judicial, and not a ministerial, proceeding was again expressly held by LORD KENYON, C.J., in *Harper v. Carr* (14). He reiterated there the necessity of a summons before a warrant of distress was granted, and said, at p. 275:

It is an essential rule in the administration of justice that no man shall be punished without being heard in his defence . . .

- G I am not here concerned with the question of the exact form of procedure in order to give the person charged an opportunity of being heard, though the procedure by summons is now statutory under the Distress for Rates Act, 1849, s. 5, under which, as already stated, the statutory forms are prescribed. It may be that, as HOLDSWORTH, HISTORY OF ENGLISH LAW, Vol. X, p. 293, seems to indicate, justices in practice did
- H not observe the true rule, or it may be that by some other means they gave the alleged delinquent an opportunity of stating his defence, at least before the ruling of LORD KENYON, C.J., but I am only at the moment engaged in ascertaining that the justices act judicially in these matters. Since the judgment of LORD KENYON, C.J., this has been recognised and laid down in a number of authorities which I need not

here cite. The *dictum* of COCKBURN, C.J., in *R. v. Price* (16) that "in granting a distress warrant for a rate justices act ministerially under the Poor Relief Act, 1601," cannot as a statement of the general law be supported. He was, however, considering the application of the Summary Jurisdiction Act, 1879, s. 47. Whatever the difficulty was under that section, it has now been removed by the amendment of the law as explained in *Fourth City Mutual Building Society v. East Ham (Churchwardens & Overseers)* (22) and later cases. Even if the party summoned has no valid objection which he can raise to being rated because the facts are clear, the justice still acts judicially in making the particular order of distress, even though no other course is open to him judicially. A B

I proceed accordingly, as did GODDARD, L.J., on the basis which is most favourable to the respondent, that the justices act judicially in these matters. However, it is necessary to consider more in detail the nature of the procedure in the granting of a distress warrant. In that proceeding, the rating authority is complainant, and the order is made after the party has been duly summoned and after proof before the justices of the relevant facts to enable them to decide if the defendant ought to have been rated at all, or, if at all, for the full rateable value. The warrant or order is a command in the King's name to the complainant and the police officers to enforce the order—that is, to execute it—in accordance with the statute. It is this aspect of the proceeding which has appealed so forcibly to GODDARD, L.J., who delivered the decision of the Court of Appeal in an admirable judgment. With all respect, however, the rock on which that good ship or vessel has, in my opinion, split is the precise language of the statute of Anne. GODDARD, L.J., having with good cause and good authority come to the conclusion that this particular form of distress is very like an execution, has gone on to hold that, as sect. 1 was expressly for the more easy and effectual recovery of rents reserved, etc., it should be widely and liberally construed. I think, however, for reasons which I shall explain, that the language of the section is not such as to include a distress for rates in the execution to which it refers. There is obviously no room for an equitable or *cy près* construction. If the policy of the Act had been to favour the landlord, not merely against an execution creditor, but against a public authority in regard to an impost necessary for public purposes, it was for the legislature, if it so intended, to express that intention in clear and unambiguous terms. GODDARD, L.J., has referred to the very striking fact that, from 1709 to the present case, no landlord has sought to rely on the point now raised. I agree with him that, if the language were clear, that fact would not necessarily prevent the court from construing the section as the respondent now claims. At the same time, the fact emphasises the need for caution in supporting so unprecedented a claim, especially when regard is had to the enormous number of cases in which a defaulting ratepayer must also at the same C D E F G H

time have been liable for arrears of rent to his landlord. It must also be noted that the books dealing with the law of landlord and tenant and of rating have given no countenance to the construction adopted by the Court of Appeal. Indeed, there has been no trace that they have considered it at all, save that in *STONE'S JUSTICES' MANUAL*, a well-known work which every justice of the peace is constantly consulting, it has been stated for nearly half-a-century that the section does not apply to a distress for rates. This has only been altered in the 72nd Edn., in 1940, since the judgment of the Court of Appeal now being considered. That admirable and useful work is not a book of authority, but it may be taken to have recorded the practice and understanding of those expert in these matters.

It is no doubt clear that a distress for rates is much more akin to an execution under a writ issued by the court than to a distress for rent or the similar distress for cattle damage feasant. Both these latter distresses are acts of self-help, though the former at least is now closely regulated by statutes starting from the Statute of Marlborough, 1267. *HOLDSWORTH, HISTORY OF ENGLISH LAW*, Vol. III, questions if the landlord's right to distrain was originally :

... a true case of self-help ; for it may be a survival from the days when lords of tenants kept a court for those tenants and distrained by judgment of the court, just as in much later days the court leet distrained for the ameracements inflicted by it.

Whether distress for rent was or was not originally a form of self-help, it undoubtedly became so, and is to be distinguished from what *GILBERT ON DISTRESS*, 4th Edn., p. 11, calls the second sort of distress for fines and ameracements in courts leet and the like which are transactions in courts of law. *GILBERT* goes on to say, at p. 281 :

The process that levies the debt [fines and ameracements] is in the book called a distress because the lord might at common law impound the distress until the fine was paid, but as the *distringas* or *levari* for levying these fines and ameracements issued in the King's name, and as the lord may likewise sell the distress, it is to be esteemed in the nature of an execution.

Similarly, the process to enforce an order of an inferior court by distress is sometimes in untechnical language called an execution. It is the executing or enforcing of the order. Thus, in *R. v. Speed* (1), in regard to a conviction for deer stealing under a statute which enacted that the forfeiture should be levied by way of distress, *HOLT, C.J.*, said, at p. 330, that "when a statute says money 'shall be levied by distress', this is an execution." Similarly, in *R. v. Hedges* (23), on an appeal to quarter sessions from an allowance of overseers accounts, the sessions, it was said, "must execute their judgment in the same manner as the two justices must do." More accurate language was used in the much-argued case of *Hutchins v. Chambers* (2), where the question was whether *averia carucae* could be taken for distress upon the poor rate where there were other available goods sufficient. *LORD MANSFIELD* said in the course of his judgment, at p. 588 :

As to this—the solid distinction, "is that the seizing under the Poor Relief Act,

1601, and such like Acts of Parliament, is but partly analogous to the common law distress (as being replevisable, etc.) but is much more analogous to a common execution," (like a *feri facias*, where the surplus, after sale, shall be returned).

He observed that, where the things seized were merely held in pledge, as in the old common law distresses, it would be absurd to have suffered the implements by which a man gained his living to be holden as a pledge, because that would have been taking the only means he had of A
paying his debt. He went on to say, at p. 588 :

But this reason does not hold, where the things distrained may immediately be sold by way of satisfaction : which, though called a distress, yet really is, in this respect, an execution.

A little later, he quotes from HOLT, C.J., in *Vinkinstone v. Ebdon* (24) B
to the effect that the common law exemption from distresses for rent arrear and other like cases does not extend to cases where a distress is given in the nature of an execution by any particular statute (as for poor rates, etc.), and he concludes as follows, at p. 588 :

Therefore it is more analogous to an execution, than to a distress at common C
law : and there (in case of execution) *averia carucae* may be distrained ; although there be other sufficient distress.

I have quoted these passages from LORD MANSFIELD because, though later than the Distress Act, 1689, which gave a right of sale in the case of distresses for rent, they distinguish that class of distresses from the D
statutory distresses, such as for poor rate, small tithes and many others, because of the fact that, by the latter, the goods distrained were seized in order to be sold to satisfy the debt. However, LORD MANSFIELD did not describe that process as an execution. He said it was analogous to an execution, or was in the particular respect an execution, or was E
in the nature of an execution. He is clearly distinguishing the statutory distress from an execution. GODDARD, L.J., fastens on these and similar passages as meaning that the two things (these cases of distress and cases of execution) can be treated as the same for the purposes of this case. He is correct so far as a sharp distinction can be drawn between distress F
for rent or for damage feasant (to which the Distress Act, 1689, did not apply) and the statutory or other forms of distress which were analogous to executions in the proper sense, but, in my opinion, he is not right in concluding *per saltum* that the Landlord and Tenant Act, 1709, s. 1, must, therefore, apply to distress for rates. Whether that is so or not G
must depend on the words of the statute, which I must now examine. Sect. 1 prescribes that no goods on any premises subject to a lease shall be liable to be taken by virtue of any execution on any pretence whatsoever unless the party at whose suit the said execution is sued out shall, before the removal of such goods from off the premises by virtue of H
such execution or extent, pay to the landlord or his bailiff arrears of rent to an amount not exceeding one year's rent. If the arrears exceed one year's rent, "the party at whose suit such execution is sued out may proceed to execute his judgment," and the sheriff is empowered and required "to levy and pay to the plaintiff as well the money so paid

for rent as the execution money." I have found the curious and almost casual inclusion of the word "extent" difficult, and shall discuss it later, but, in any case, I do not regard it as affecting the general scope of the section. The section deals with an execution sued out at the suit of a party to an action, an execution under which that party executes his judgment, he being the plaintiff. The fruit of the execution is execution money. In my opinion, all these terms are appropriate to an action in a court in which there is a plaintiff (which, as *Henchett v. Kimpson* (4) shows, may include a defendant enforcing a right to costs on a non-suit). There is a judgment in the action. Upon that judgment, the plaintiff, being the party in the action, sues out execution—that is, a writ of execution upon the judgment. The execution of the writ is entrusted to the sheriff or other officer. They are all equally inappropriate to a distress warrant issued by justices for arrears of poor law. The rating authority is not a plaintiff, but a complainant. He makes a complaint. The word "plaintiff," so far as I can find, is never used in connection with these proceedings, and could never be properly so used. There is no judgment, no issue of an execution upon a judgment at the suit of any plaintiff, and no execution money, no writ to a sheriff or other officer, which I think means to a sheriff or some officer acting for him. What happens is that the justices, having as a *datum* the rate which they must assume to have been duly made, and having summoned, and judicially considered the case of, the alleged defaulter, order a distress by means of a distress warrant in the statutory form addressed to the rating authority and to the constables or other peace officers of the borough. I find it impossible to bring such a distress warrant within the narrow and precise language of the statute. These statutory distresses ordered by justices and other inferior courts were well-known at the date of the statute, the nature and form of a distress warrant in these cases were familiar, and so were the procedure and process in its essential particulars, as the language of HOLT, C.J., shows. It is true that there is no decision that the statute did not apply to orders for distress made by justices, but that is due to the fact that it was never claimed that the statute did apply. There are, however, reported decisions which deny the application of the section to particular proceedings which in many respects resemble executions of the ordinary type. The fullest discussion I have found is *Brandling v. Barrington* (6) The defendant there was the sheriff of the County Palatine of Durham. He had seized certain goods under a writ of *pone per vadios* issued at the suit of the plaintiff in the action by the Court of Chancery of the County Palatine. The object of the writ was in effect to compel a defendant to appear. If the defendant did not appear, the goods of the defendant were forfeited to the bishop and seized, and were sold by the bailiff who had made the seizure. Out of the proceeds, the plaintiff's claim was satisfied. The landlord brought an action against the bailiff for not paying him the half-year's rent then due. It was held that the statute

of Anne did not apply, and the landlord was non-suited. That was indeed a case of mesne process, and there was no final order of any court, but it was in fact a process by which the plaintiff's claim was satisfied, though in form what happened was that the goods seized were forfeited to the bishop and by him assigned to the plaintiff, so far as necessary for the claim for which the action was brought. The judges of the King's Bench were all of opinion that, though the case fell within the "equity" of the statute, it did fall within its words. LORD TENTERDEN, C.J., said, at p. 475:

... the statute speaks only of goods taken by virtue of any execution, and the plain sense of the words is confined to executions on judgments.

In the same case, BAYLEY J., said, at p. 477:

... I think we should be attributing too comprehensive a meaning to the words of this statute, if we held that it entitled the present plaintiff to payment of the rent due to him. The goods of the tenant were not taken in execution, although that which has been done may have had the effect of an execution. The writ of *pone* is similar to the *distringas* issued out of this court for the purpose of compelling an appearance. Under the latter the sheriff may, by order of the court, sell the goods seized, and deliver over the proceeds to the plaintiff without paying to the landlord a year's rent.

In *Lee v. Lopes* (25), an attempt had been made, but had failed, to extend the scope of the statute to a commission in bankruptcy. LORD ELLENBOROUGH, C.J., said that a commission of a bankrupt had been sometimes called a statutable execution, but, though it might be said to be similitudinary to an execution, it was not an execution. No greater success attended attempts to extend the scope of the statute to a sequestration, as appears from *Dixon v. Smith* (26), which is explained by LORD TENTERDEN, C.J., in *Brandling v. Barrington* (6), at p. 476, as a payment made out of the proceeds of the sequestration by the court into which the proceeds had been paid. It was clearly not under the statute of Anne, as the arrears of rent so paid were for two years. The case of outlawry, *Greaves v. D'Acastro* (27), is likewise explained by LORD TENTERDEN, C.J., as a proceeding by application to the favour of the Court of Exchequer. This view seems to be supported by *R. v. Southby and Etchings* (28), where the landlord was not relieved.

These authorities are not, indeed, directly relevant to the exact position in respect of a distress warrant for arrears of rates issued by justices, but they do, I think, support the conclusion that the statute of Anne is to be construed according to its terms, that execution is to be construed as meaning an execution in the ordinary sense—namely, under a judgment of a court—and that the word "plaintiff" is also to be construed as meaning a party to an action in which he claims relief. The proceeding by way of a complaint for a distress warrant is a special and peculiar proceeding, not, indeed, limited to the poor rate, since it also applies to various other rates, for instance charges under local statutes and to others like the small tithes. In his able argument, counsel for the respondent drew your Lordships' attention to many instances of this

nature. As regard poor rates, at least, it has been held that there is no debt which can be claimed in a court of law or by ordinary process. This was the decision of the Court of Appeal in *Liverpool Corpn. v. Hope* (18). I agree with that decision, which again emphasises the difficulty of applying the ordinary language appropriate to enforcing a common law liability to a liability which is the creature of statute such as that in question.

In 1709, such terms as execution, plaintiff, party, judgment, were well-defined and understood. The question under the Act of Anne must be how these are to be applied to any particular procedure, and, in particular, for purposes of this appeal, to the process involved in a justices' warrant of distress for rates. When the modern county courts were established, their procedure was in many respects, including execution, assimilated to that of the superior courts. The County Courts Act, 1888, s. 160, provided that sect. 1 of the Act of 1709 should not apply to an execution of a county court, but then in effect it went on to apply it, subject to modifications as to the amount of arrears of rent claimable by the landlord. It is thus not necessary to consider whether the Act of 1709 would, apart from express words, have applied to this new type of execution.

I cannot, with the greatest respect, find any justification for giving the landlord the priority which he is claiming here over a rating authority, which cannot in any ordinary sense of the term be described as an execution creditor. The introduction of the word "extent" into the section is very odd, and is certainly difficult to explain. The section could not, in my opinion, be applied to statutes merchant or statutes staple or the like, in which there is clearly no judgment and none of the ordinary features of a legal proceeding. The draftsman of the Act may have thought that extents in aid might be considered to be sufficiently near to an execution issued at the suit of a private person, and thus to come within the protection of the section. It was indeed held in *R. v. De Caux* (10), in 1815, that an extent in aid, though issued in aid of a subject, was a prerogative process, and ultimately and in effect operating for the benefit of the Crown, and that, therefore, under sect. 8, sect. 1 could not be construed so as to operate to the prejudice of the Crown. The court referred to *R. v. Cotton* (20), where in 1751 there was an elaborate discussion of the point, and went on to say that the word "extent" might be satisfied by applying it to such as were of a private nature, as extents on statute staple and others. As I have already indicated, I do not feel able to reconcile this with the words of sect. 1. However that may be, I do not regard the somewhat casual insertion of the word "extent" as sufficient to change the whole substance of the section. For all these reasons, I would allow the appeal.

LORD ROMER: My Lords, GODDARD, L.J., in the judgment which he delivered on behalf of the Court of Appeal in this case, has given

reasons which to my mind are conclusive for thinking that a distress for rates may be properly described as an execution. Sir Edmond Saunders in his observations upon the statute 22 Car. II, c. 1, published in 1685, had come to the same conclusion. By sect. 2 of that Act, which had been passed for the purpose of preventing and suppressing seditious conventicles, it had been enacted that, on conviction by the justices, an offender against the provisions of the Act should for every such offence incur the penalty of 10s., and that the same should be levied by distress and sale of the goods and chattels of the offender. In commenting upon this section, the author said :

Goods and chattels ; this reaches to the utensils, tools and instruments of trade, as well as any other goods and chattels ; for the rule of the common law that exempts such (where there is sufficient besides) from distress extends not where distress is given as an execution by any particular statute, as for poor rates, hearth money, and so the like on this law, and governs only in distress for rents, amercia-ments, and the like.

In 1699, HOLT, C.J., in *R. v. Speed* (1) expressed a similar view. He said, at p. 330 :

When a statute says money "shall be levied by distress," this is an execution.

However, though I am of opinion that the word "execution" was in 1709, and still is, in general wide enough to include a distress for rates, I find it impossible to think that it is used in such a wide sense in the Landlord and Tenant Act, 1709, s. 1. The question whether or not it is so used is one to be determined by applying to the section the well-settled principles of construction. Not the least important of these principles when applied to the section is that which requires that, for the purpose of ascertaining the sense in which the word "execution" is used, the section must be read as a whole. So reading it, I find that every execution to which it applies is treated as possessing the following characteristics—namely, (i) it must have been sued out at the suit of "a party," (ii) it must be an execution of "a judgment" in favour of that party, and (iii) the party at whose suit it is sued out must be one who can aptly be described as "a plaintiff."

My Lords, in my opinion, a distress for rates cannot, without a straining of language for which I can find no justification, be said to possess any one of these characteristics. It is not sued out at the suit of "a party," there is no "judgment" in favour of "a party," and, although a defendant in whose favour a judgment has been pronounced in an action must for this purpose be treated as being a "plaintiff" within the meaning of the section, I fail to see how a rating authority, by applying for and obtaining a warrant of distress for unpaid rates, can be properly so described. I am therefore of opinion that sect. 1 of the Act of 1709 does not, upon its true construction, apply to a distress for rates. In arriving at this conclusion, I derive some satisfaction from the thought that, in spite of the numerous occasions on which during the last 230 years it must have been to the interest of the landlord of a defaulting ratepayer

to suggest the contrary view of the meaning of the Act, no one of them until the present case would appear to have done so. I also find some satisfaction in the fact that the legislature itself appears to have taken the same view as that which I have expressed. The Distress for Rates Act, 1849, prescribes the form to be used by justices when issuing a

A warrant for distress for non-payment of rates, and the warrant in the present case follows the form so prescribed. It is addressed to the rating authority, and commands them in His Majesty's name to make distress of the goods and chattels of the defaulters, whose names, together with the amounts due from them respectively, are set forth in a schedule
B to the warrant. It continues as follows :

... and if within the space of five clear days after the making of such distresses respectively the several sums set opposite to the respective names ... together with the reasonable charges of taking and keeping the said distress in each case shall not be paid, that then you do sell the said goods and chattels of the person so making default, and out of the money arising by such sales respectively, you
C retain the sums so set opposite to the name of each person whose goods and chattels you shall have so sold, together with the reasonable costs and charges attending such distress and sale, rendering to such person the overplus (if any).

It will be observed that no provision whatever is made by the warrant for refunding to the rating authority any sums paid by them to the
D landlords of the defaulting ratepayer in respect of arrears of rent, as it would have done had it been thought by the legislature that sect. 1 of the Act of 1709 applied to a distress for rates. The appellant, as the agent of the rating authority, the Wolverhampton Corporation, applied the net proceeds of the goods and chattels of the respondent's tenant
E in discharging, so far as such proceeds would permit, the rates due from the tenant without making any provision for the arrears of rent due to the respondent. In so doing, he was merely acting in the way in which the justices had, in His Majesty's name, commanded him to do. It is a curious aspect of the case that the respondent now seeks to make the
F appellant responsible in damages for having so acted. My Lords, for the reasons I have given, I agree that this appeal should be allowed, and I concur in the motion now before the House.

Appeal allowed with costs.

Solicitors : *Sharpe, Pritchard & Co.*, agents for *J. Brock Allon*, Town
G Clerk, Wolverhampton (for the appellant); *Simon, Haynes, Barlas & Ireland*, agents for *Feibusch & Wells*, Wolverhampton (for the respondent).

[Reported by C. ST.J. NICHOLSON, ESQ., Barrister-at-Law.]

O'MELIA v. FREIGHT CONVEYORS, LTD., AND
REDERIAKTIEBOLAGET SVENSKA LLOYD AND ANOTHER.[LIVERPOOL AUTUMN ASSIZES (Croom-Johnson, J.), **November 13, 14, 18, 1940.**]*Factories—Breach of statutory duty—Loading ship—Rope-sling breaking and contents falling on workman below—Docks Regulations, 1934 (S.R. & O., 1934, No. 279), reg. 20.* A*Master and Servant—Duty of master—Provision of safe system of working—Loading ship—Rope-sling breaking and contents falling on workman below—Rope changed without knowledge of employers.*

The plaintiff, a dock-labourer in the employ of the defendant stevedores, was engaged in assisting to load bags of wet salt by means of a rope-sling and pulley hoists from a barge where he was standing into a ship. A sling containing a number of bags of salt was hoisted by the proper machinery to a point some 13 ft. above the barge when the rope broke and the load of bags fell upon the plaintiff and seriously injured him. The plaintiff claimed under the Docks Regulations, 1934, reg. 28, and also at common law, alleging that the defendants used a defective sling and that their method of working was not reasonably safe. It was found as a fact that the rope was of proper quality and that the sling was carrying a safe working-load. It was proved that the rope did not belong to the defendants, a good rope issued by them having disappeared and another rope been substituted. Counsel for the plaintiff contended that this indicated a fault in the system of working, which entitled the plaintiff to recover. There was no evidence of mixing of ropes, nor had such a change of ropes been known to happen before. The rope broke because one strand at least had been severed before it was used on this occasion :—

HELD : (i) the defendants had provided a safe and proper system of working, notwithstanding the change of rope. The employer's duty is to provide a reasonably safe system of working, but he is not bound to see that nobody makes a mistake in the course of using the system.

(ii) since the obligation under the Docks Regulations, 1934, reg. 24, to provide a rope of suitable quality and free from patent defect is cast upon the owner of the rope, no liability under this regulation attached to the defendants.

(iii) in the circumstances, there was no duty on the defendants to examine or test the rope used.

[EDITORIAL NOTE.] This case considers matters of great interest to stevedores, and is also of some general interest on the subject of the adoption of a proper system of working. The careful consideration here given to the supply of rope-slings and the nature of the duty to inspect and care for them will be very helpful to everyone concerned with shipping and docks, and, indeed, to others whose work necessitates the use of ropes.

As to DOCKS, see HALSBURY, Hailsham Edn., Vol. 14, pp. 619, 620, para. 1174 ; and FOR CASES, see DIGEST, Vol. 24, pp. 915-919, Nos. 104-133.]

Cases referred to :

- (1) *Wilsons & Clyde Coal Co., Ltd. v. English*, [1938] A.C. 57 ; [1937] 3 All E.R. 628 ; Digest Supp. ; 106 L.J.P.C. 117 ; 157 L.T. 406.
- (2) *Weir (or Wilson) v. Merry & Cunningham* (1868), 6 Macph. (H.L.) 84 ; 34 Digest 207, case 1697 xiv ; 40 Sc. Jur. 486 ; on appeal (1868), L.R. 1 Sc. & Div. 326.
- (3) *Weems v. Mathieson* (1861), 4 Macq. 215 ; 34 Digest 196, 1604.
- (4) *Smith v. Baker & Sons*, [1891] A.C. 325 ; 34 Digest 202, 1657 ; 60 L.J.Q.B. 683 ; 65 L.T. 467.

A ACTION for damages for personal injuries received by the plaintiff when he was in the employ of the defendants, a firm of stevedores in Liverpool. The plaintiff was engaged in loading operations, when a sling broke and several bags of wet salt fell on him. The plaintiff alleged that the defendants used a defective sling and that their method of working was not reasonably safe. He claimed also under the Factory Act, 1937, s. 23, and under the Docks Regulations, 1934, reg. 28.

Wilfred Clothier, K.C., and *A. D. Pappworth* for the plaintiff.

F. A. Sellers, K.C., and *H. I. Nelson* for the defendants.

R. S. Nicklin for the third parties.

B CROOM-JOHNSON, J. : The plaintiff in this action was at all material times a dock-labourer employed at the Liverpool docks. He was a man of 36 years of age, and on Nov. 14, 1939, he was employed by the defendants Freight Conveyors, Ltd., as a dock-labourer. It is common ground that, in the course of his employment, the plaintiff was engaged in assisting in the loading of bags of wet salt by means of a rope sling and the usual pulley hoist from the barge Premier lying in the Alexandra Dock, Liverpool, on to and into the steamship Canadia, lying alongside. At some time during the morning of Nov. 14, 1939, a number of bags of salt, probably seven, had been put into the sling and had been hoisted some 10 ft. to 13 ft., probably to the top of the rail of the steamship, when the rope broke and the load of bags fell down upon the plaintiff, who was with his mate or mates in the gang engaged in preparing the next load for another sling. The result was that the plaintiff was seriously injured.

E The action was framed in three different ways. First, it was alleged that the defendants had neglected to carry out their statutory duty under the Factory Act, 1937, s. 23. Secondly, there was a similar claim under the Docks Regulations, 1934, reg. 28, and, thirdly, there was a claim at common law. I may say at once that, as far as the claim under the Factory Act, 1937, was concerned, at a very early stage in the proceedings, certain manifest difficulties in the way of that claim having been pointed out to the court, counsel for the plaintiff—quite rightly, in my view—decline to submit a series of contentions which were based on manifest misapprehensions of the effect of the legislation. The case was accordingly conducted on the basis that there were only two possible ways of putting this claim. One was under the Docks Regulations, 1934, reg. 28, and the other was at common law.

G The facts as I find them are these. The defendants are stevedores. H For the purpose of their business, they have at the Alexandra Dock stores in which they keep the ropes, slings and other tackle which they have to use at that dock. They have a similar store at other docks. It was not suggested that there was any possibility of confusion or mixing of the stores in one storeroom at one dock and those in the other storeroom at the other dock. The storeroom at the Alexandra

Dock was placed in the charge of a storekeeper called Byrne. It was not suggested that Byrne was other than an extremely competent and careful man, or that there was any fault to be attributed to the defendants in employing him. The system for unloading of vessels is that the slings are put together in jags at the defendants' stores. A jag consists of three slings, and two jags—that is to say, six slings altogether—make A a set of slings. These slings are under the control and care of, and are examined by, the storekeeper, and they are issued for particular jobs—that is to say, for the unloading of a particular vessel—at the commencement of each job. As long as the vessel is being unloaded from the barge B and the cargo loaded into the ship, the slings are not returned to the store. They remain out until the loading is finished, when they are sent back and deposited somewhere in the open outside the store. They are then examined by the storekeeper, or by somebody under his direction, to see whether any of them have suffered from the heavy work they have been doing. If they are in proper condition, they are taken C inside the store and made up into jags and sets, as I have already indicated. A set is tied round with some lighter cord or rope, so that, when the set is sent over, it can be seen at once that it is a set from inside the store, and has been examined.

On Nov. 13, the plaintiff, who had not hitherto worked for the defendants, was loading from a barge with other men. Slings were sent for, and, according to the plaintiff's account of the matter, the foreman, Skellan, instructed them to go to the store, which was about 100 yds. away at the end of the shed. Two men got the slings, and when the slings arrived, Kehoe and the plaintiff were then directed by Skellan D where to go. According to the plaintiff's account of it, he took one sling and remained on the quay, and he told me that he thought that the sling produced was that sling. He told me that he remained working on the quay that day. Quite what he was doing working with one sling, and how it would be of assistance to him, I do not know, but it E is plain that on that day the loading on shipboard was from the quay-side, and not from the barge. At the end of the day, according to the plaintiff's account, the sling which he had been using was left by the cargo where they were working, and not in the store. The system was that at the end of each day the slings in use on a particular vessel— F that is to say, the set, in this instance—were put together on the quay-side opposite where the ship was being worked, where there were three or four heaps. This particular set of slings was left opposite the hatch where the plaintiff was working. The quay is not open, and the shed is not an open shed. The place was locked up all night. There was a G gateway which opened inwards, and there was a watchkeeper who had to see that no unauthorised person got in. There was no suggestion in the course of the case that there was any want of due care in safeguarding the slings during the night, or from the time when the gang ceased work on the first day. Neither was there any case raised on behalf H

of the plaintiff that there was anything wrong in the system of leaving the slings at that point ready for use on the following day, and neither was there any suggestion that in fact any sling had been taken away that night.

The next morning—Tuesday, Nov. 14—the plaintiff went back to his work. He came on at 8 a.m., and he worked with his mate at the same place for the first two hours. He said that he and his mate got the slings from where they had left them in the shed, where apparently they had to be put, with all the other tackle used on this job. The gates were closed, and the plaintiff told me that, in his opinion, he worked with the same sling on Tuesday, Nov. 14, as that with which he had worked on the previous day. I think that there is some misapprehension at this stage about the matter, and it arises in this way. The plaintiff in relation to each of these two days speaks of one sling as though he worked with only one sling. I am quite satisfied that he did not. What he did was this. With the other people in the gang, he had put a number of bags into the sling. That sling would be hoisted and taken away. Eventually, it would be undone on whichever deck of the vessel the goods happened to be unloaded on to at that time. Meantime, another sling was being loaded in the barge, and that sling would be loaded, would go up, and in due course the other sling, which had gone up, and had then gone down into the vessel, would come back loose, depending from a hook. Thus, altogether there were six slings in constant use. I am merely mentioning that because of the plaintiff's attempt to identify the sling which he said he used on Nov. 13 as the same sling as that described by him on Tuesday, Nov. 14.

On Nov. 14, apparently, a change was made in the work after two hours. At 10 a.m. the plaintiff and his gang were told to go over-side into the barge Premier, which they did. The only difference at that moment was that, instead of loading bags—which, on the evidence, I find were bags of 220 lbs., each sling consisting of 5 bags—from the quay into the vessel, they were unloading them from the barge and loading them into the vessel. Later on in the morning, another change was made, when the foreman, Skellan, shouted down that they were to get 7 bags on the slings instead of 5 bags. I come to the conclusion that the 7 bags were bags of a rather different weight and size, although the contents were the same—namely, wet salt. The only importance of the matter is to see what weight the 7 bags would total. The method of attaching the bags together was this. A sling, which is a piece of rope spliced together so as to make a circle, is used. That is put down, and is necessarily put down, so that the two sides can be parallel to one another, and the bags are piled across the two sides, two and two, and one on top, making seven. One side of the sling is then slipped through the other side like a slip knot, the chain and hoist is lowered by the man in charge of the winch, and the hook at the end of the chain is brought close enough for one of the men to put the end of one of the

slings which has gone through the other end of the sling on to the rope. I suppose some instruction is shouted to the man in charge of the hoist as the thing goes up, so that he may tighten the grip of the whole of the sling upon the bags at the point where one end of the sling is hanging on the rest of the sling. The result is a tightened grip, but the result also is that over the hook there is only one length of rope, and not two. A Two pieces of rope are round the bags, but the end—the sloop, so to speak, which has gone through the other loop of the sling—is depending from the hook. The result is that this sling is no stronger than that point, and, as it seems to me, at that point at which the sling is hanging from the hook, the only strength for the whole load is the breaking-strength of the one piece of rope, and not that of two. B

It was common ground that, if this rope of which the sling was made had been 3 in. rope, the breaking-strain of it would have been 3 tons 10 cwt. If it had been 2½ ins. rope—a fact which, in view of what I will state a little later, is of the utmost importance in this case—the C breaking-strain would have been 2 tons 18½ cwt. However, everybody knows that, with regard to all matters of weight, provision must be made for a margin of safety. It is agreed in this case that, as a rough-and-ready guide, the breaking-point of the strain should be divided either by six or by seven. Some controversy arose as to whether the D figures which had been given in the case were figures as to the safe working-load of the slings or as to that of the rope. There was evidence by an expert for the plaintiff that he was talking about the sling. I am satisfied in my own mind that, whatever is the safe working load, regard has to be had to the effect at the one point which matters—namely, E the point over the hook—at which point the rope is a single one, and accordingly I have approached this case from the point of view of whether or not this rope was strong enough at that point.

That involves, I think, an examination of two questions. First of all, I must see whether there was any arrangement at the docks, not in F the nature of a binding agreement which bound either the plaintiff or the defendants, but in the nature of some general working arrangement between either the defendants, or somebody representing them, and the appropriate trade union, which I can use as evidence to see whether in fact the weight being used was reasonable. I was given evidence which G I will deal with in a moment as to that arrangement. The other question which was investigated was as to the size and particulars and condition of the rope itself. As far as the arrangement was concerned, I had evidence on behalf of the plaintiff from one Gutscher, who was a trades union official. He told me that an arrangement had been made—he H described it also as a definite custom—by which a sling of the sort which was to be used here—and I say deliberately of the sort, because I mean by that the sort which ought to have been used here, in view of the controversy which arose—was 10 cwt. He told me that there was a little accommodation permitted in regard to that, and that seven bags

weighing between them a little more or a little less than 10 cwt. would be in compliance with the arrangement which was made. Another trades union official, Gibbins, told me that there was a specific arrangement, and that it was 10 cwt., neither more nor less. That, it seemed to me, would involve the fact that somebody would have to be down

A in the hold, if that was really a binding arrangement, weighing the bags in order to see whether or not the arrangement was being carried out. Gibbins told me that the arrangement would be either 5 bags of 220 lbs., or 7 bags of 75 kilos., either of which would be about right. He said that nobody had confirmed it in writing, but that the specific weight

B was agreed.

Jones, a director of the defendants, who was a party to that arrangement, told me in effect that the agreed amount which he had arranged with Gibbins was 10 cwt., that it was more or less agreed that that was to be the basis, and that 5 bags of 220 lbs. each, which would, I gather,

C be a little more than 10 cwt., or 7 bags of 75 kilos., which would also be a little more, would be in accordance with the agreement. I was struck by the evidence of Gutchet. I thought that he was a witness who was not going to turn himself into an advocate. He was telling me what he really remembered, and telling me the effect of the practice,

D and his evidence is in conformity with the evidence given by Jones. It seems to me that such an arrangement as that suggested by Gibbins would be one which would be impracticable in the day-to-day working of the docks, and I prefer and accept the evidence of Gutchet and Jones on the point. I therefore come to the conclusion that the weight which

E was being put upon what was thought to be a proper sling at the time—namely, 10 cwt. and a few pounds—was not an improper weight or an unreasonable weight, and, if things had been normal, would have been justified both as a fact and by what I find to be the arrangement which had been made for the working of this sort of job at the docks.

F The next thing to examine is the steps taken by the defendants in connection with the ropes. I was satisfied to accept the evidence of Jones as to the careful system which the defendants have at the Alexandra Dock for safeguarding the security of their plant and the security of the people who have to work with it. I was quite satisfied

G that every care was taken. I was told that the rope was obtained from Messrs. Hutchison & Pollok. It was Grade 2, and it was 3 ins. to 3½ ins., and not less. It was proper manila rope, and it was made into slings by the storekeeper. No one made any comment as to the method by which those slings had been manufactured. Jones told me in detail

H how the slings were made. They were made 7 fathoms long to cover general cargo. The storekeeper issued the slings, and, in addition, he was told to put outside into a dump any ropes which had become worn. He was told that those ropes were to be cut up, and that, in addition, any man who was called upon to work with a sling and who found that the sling was not everything which he thought it ought to be was

entitled—and, as I gather, encouraged—to throw it out. The plaintiff himself told me that, if the rope ought not to be used, he could cut it and then send to the store for another one, but that in this case there was no occasion to do so. In addition, Jones told me, and I accept it that, as far as general supervision was concerned, he visited each job practically every day. He did not profess to have looked at the slings A in the sense of examining them, but, as I gather, he looked round generally, and, being an experienced person, no doubt anything unusual would be brought to his attention and would be perceived by him. He said that he looked at the slings and looked at the working-gear. He could see whether or not it was in proper order. I am therefore quite B satisfied upon the evidence that, as far as the breach of duty here is alleged to have arisen from a want of system in the provision of proper plant, the system as devised was most carefully devised and was most carefully carried out in all those things which up to this time had been experienced. Whether that necessarily disposes of the plaintiff's claim C is a question which will have to be considered.

I am quite satisfied that this rope was not cut by being caught underneath the coamings of this barge. The only coaming, if that is the right expression to use, was the edge of a sort of narrow alleyway or walk round the edge of the barge, which is an open-deck barge. D There are no hatches in the ordinary way, and, in view of the way in which these bags were being loaded, I think that it is most unlikely, and I am not satisfied, that this rope was caught on the coamings of this barge on that morning. When this rope was being used, one at least of the three strands of which this rope was made was cut at one E place, and one of three strands was also cut at another place, and I am satisfied that the rope broke at one of those two places where its strength was weak. I have to set against that the statement of the plaintiff that he saw nothing wrong with the rope, but the suggestion that those cuts did not exist on the day when the rope was going up is, I think F falsified by the evidence in the case. In those circumstances, the suggestion made by the plaintiff's experts being that there was nothing in this rope in the nature of a cut, the suggestion upon which they fall back is that this rope was not of good quality, that it was frayed on the outside, that, if it was twisted in the reverse direction from the twist G of the manufacture, there was some sort of drying inside, that it had lost its natural oil, and, indeed, that it was as bad a rope as could be used on a job of this sort. I am not satisfied of those facts. I am mindful of the fact that this rope had been used for the hauling of wet salt, probably under very wet conditions. The rope was wet and dirty, H and I am quite satisfied that, as to the essential oils in the rope, the rope had been subjected to a saline solution for quite a long time, and one is entitled to use one's general knowledge as to what the effect of that was likely to be upon the oil in the rope. The rope was then put on one side. As far as I know, it has remained in the care and custody of the

solicitors or agents of the defendants, and I have no doubt that all the oil was dried out. Having regard to the lapse of time before the rope was seen by the experts called on behalf of the plaintiff, I am unable to find—and the onus of proof is upon the plaintiff—that this rope was other than a rope of suitable quality and free from patent defect, except
A in so far as I find that, at the moment when it was being used, it was cut through to the degree which I have previously indicated.

That being the state of affairs, it opens the door to the two arguments which I find are the real points in this case. First, the argument by counsel for the defendants was that this was not the defendants' rope
B at all, to which the counter by counsel for the plaintiff was: "If it was not the defendants' rope, it was being used in the defendants' business by their workmen under the instructions of their foreman, and, that being so, there must be something wrong with a system of working under which such a thing becomes possible." I am quite satisfied that
C this was not the defendants' rope. They did not own it, and it did not come from their stores. I am satisfied that they were in no way responsible directly for its being in use.

In the course of a most convenient summary of his case on this point, counsel for the defendants mentioned six points in connection with the
D identity of the rope. First, he told me that the slings made by the defendants were always 7 fathoms (42 ft.), whereas this rope was admittedly 38 ft. Secondly, the rope which broke had a red strand or paintmark or colouring-matter upon some of the fibres which made up the inside. Thirdly, the rope made for and used by the defendants was
E 3 ins. or $3\frac{1}{2}$ ins. in circumference, being a manila rope, whereas the rope in fact used was $2\frac{3}{4}$ ins., which had swollen in use until it looked like a 3 ins. rope. Fourthly the splice was different, because the splice of the rope used had a rough end which had been cut off on either side, whereas it was the practice of the defendants' storekeeper to leave that
F rough end on. Fifthly, the storekeeper, Byrne, told me that a rope of the sort produced in court was not such a rope as he had ever had. Sixthly, and not the least important, the steamer which was being unloaded, the *Canadia*, belonging to the Svenska Co., did use ropes which had the red strand in them. I do not find it necessary to pursue
G the investigation into the evidence on all those points. I may say at once that I am satisfied beyond any possibility of doubt that counsel for the defendants through his witnesses made good every one of those points.

Perhaps I had better refer to one other point which was indicated
H and which I have left out—namely, the suggestion on the part of the expert called for the plaintiff that this rope had stretched, had therefore become weakened, and had broken. The difficulty about that is this. Once it is admitted that the rope was a $2\frac{3}{4}$ in. rope and that it had swollen so that it looked like a 3 in. rope, and that it had swollen to such a degree that 3 ins. was its minimum, I find it difficult to accept

the evidence that that rope had at some moment stretched, because, presumably, in accordance with the ordinary laws of nature, a thing which has stretched will have become thinner. The situation is, therefore, that this is not the defendants' rope at all. It is quite obvious that in some way or another, as I find, a rope, which had been a good rope, issued by the defendants' responsible and experienced servant for use for this job, had disappeared, and that some other rope had been substituted. Counsel for the plaintiff was at some pains to make an inquiry as to what had happened to the other 5 of the set, or whether the whole 6 of the set reached the store. It is so easy when one gets into court to think of all sorts of investigations which might have been made, but, when a man like the plaintiff suffers an accident, everybody is minded to look after him and assist him and see that he is cared for, and then see to the rest of the work, so that, on the whole, it is not surprising that somebody did not do that which professional people would at once have done had they been present on the scene at the time. C

That being the position, I have to consider the final point of counsel for the plaintiff. He says: "That is a fault in the system under which this work is done. That is something which ought to have been guarded against, and something which indicates that the defendants were guilty of negligence in the carrying out of their common law duty, and it entitles the plaintiff to recover." There is now, as far as the common law duty is concerned, very little difficulty in considering the true position. The duty is laid down in *Wilsons & Clyde Coal Co., Ltd. v. English* (1). The duty of the master is to provide a proper system of working. It is laid down in that case, at p. 81 ([1937] 3 All E.R., at p. 642), as coming from the opinion of LORD CAIRNS, L.C., in *Weir (or Wilson) v. Merry & Cunningham* (2), at p. 332. By those words LORD WRIGHT, whose opinion in *Wilsons & Clyde Coal Co., Ltd. v. English* (1) I take, is saying that there is meant [p. 81 ([1937] 3 All E.R., at p. 642)]: D

... not a warranty, but a duty to exercise (by himself and his servants and agents) all reasonable care. F

In *Weems v. Mathieson* (3), LORD WENSLEYDALE, as stated by LORD WRIGHT in the *Wilsons & Clyde Coal Co.* case (1), at p. 81 ([1937] 3 All E.R., at p. 642), says, at p. 226: G

The employer was responsible for what he was responsible for in point of law—namely, the defect on his part in not providing good and sufficient apparatus and in not seeing to its being properly used."

Then LORD WRIGHT continues as follows, at p. 81 ([1937] 3 All E.R., at p. 642):

These latter words I take to refer to system. It was the effect of these and similar cases in this House that was compendiously and accurately expressed in *Smith v. Baker & Sons* (4) by LORD HALSBURY, L.C., LORD WATSON and LORD HERSCHELL. H

That obligation, as appears from a later passage in the same opinion, at p. 84 ([1937] 3 All E.R., at p. 644), is continuing, and I have to consider whether or not all reasonable care was taken in this case.

A It seems to me that the employer has not to guard against every conceivable contingency. There was no evidence before me of this mixing of ropes, nor was it known to any of the people in this case to have happened before. Quite the contrary. The case made by counsel for the plaintiff from start to finish was that there had been no mixing of ropes, and he apparently argued on the basis, as I understood it, that there could not be a mixing of ropes, that this rope was in truth and in fact a rope which belonged to the defendants, and that in truth and in fact it had come from the defendants' stores. That being so, as I have come to a totally different conclusion on these points, being B driven to it by the evidence, as I see it, it seems to me very difficult now for the plaintiff to turn round and say: "We now say that there was a mixing of ropes, and that is something against which you ought to have guarded."

C I do not think that the provision of a proper system means that the employer undertakes that he will see to it that nobody makes a mistake, that there is no slip, or that he guarantees against the possibility of anybody taking a good rope of the employers and leaving an old one behind, or that he guarantees that the servants in common employment (with the plaintiff in this case) will not be guilty of an D act of negligence in themselves picking up a faulty rope when a perfectly good rope is provided. I do not know of any authority which compels me so to find. I think that the employers' duty is to provide a reasonably safe system of working. I think that here they did so. I do not think that this contingency, which, as far as I know, has never E before arisen in the working of the Liverpool docks, is one for which I ought to hold the employers guilty of negligence for not guarding against it.

F It may be that, now that an accident has happened in the working of these docks, in future it may be right and proper for stevedores to guard against its recurrence. In this connection, I am reminded that stevedores do not always provide ropes. In some instances, they themselves told me, and I am satisfied, the ship supplies the ropes, and that may be a reason for taking steps to see that the ropes are properly issued from the store and put on one side at night. G I cannot think that that is a reason for indicating that the employers ought to go down each morning and see that each man is using one of their ropes, and not some other rope which he has happened to pick up on the quayside.

H That being the position, I am quite unable to find that there is any want of a proper system of working by these defendants. I am satisfied on the evidence that the safe working-load of this rope, in the condition in which it actually was, was less than 10 cwt. I think that the rope broke because it was in truth and in fact a rope one strand at least of which had been severed in one, if not two places before it was ever used on this particular hoist. The defendants had arranged that, if a

rope did become damaged, even if it was not an essential rope, it was possible and allowable to cut it, so as to show that it was not to be used, to throw it on one side, and to ask for fresh ropes. I use the word "rope" as being synonymous with sling at this moment. If the foreman had been there and had seen this strange rope which had got into use, he would have thrown it out. How it came about that it was unnoticed I do not know. It is not necessary for me to say that that is negligence on the part of anybody. A

In the Docks Regulations, 1934, reg. 20, it is provided as follows :

No rope shall be used in hoisting or lowering unless (i) it is of suitable quality and free from patent defect . . . B

That obligation under these regulations is one which is confined to the owner of the machinery or plant used in the processes. Processes consist of loading, unloading, moving and handling goods in or on or at any dock, wharf, quay and so on. The argument advanced was that I should read the word "owner" as though it meant, not the person who owned, for example, the rope or sling, but any person who happened to have that rope or sling in his care, custody, possession or power. I do not think that at any material time the defendants had this rope in their care, custody, possession or power, excepting in so far as it was being used without authority by the plaintiff and members of his gang by some accident or mistake on this morning. However, if I do add my own view as to construction, I see no reason for construing the word "owner" in other than its plain meaning. It is to be observed that, in paras. (a) and (b) of the same set of duties, various regulations are prescribed to be observed by certain other people. For example, para. (a) makes it the duty of the person having the general management and control of the dock, wharf or quay to comply with Part I of the regulations. The draughtsman there really has in mind the possibility of somebody in control of something having to obey certain regulations. Para. (b) makes it the duty of the owner or master or officer in charge of the ship to comply with Part II of the regulations, obviously indicating that somebody in charge of the ship as well as the owner of the ship is to be put under certain duties. Therefore, when I see in para. (c) that it shall be the duty of the owner of the machinery or plant used in the processes, I assume that by that change of language the draughtsman meant a change of meaning, and it is all the more important to consider that, because the rest of para. (c), which is not in point here except upon the question of construction, goes on to deal with the case of plant or machinery carried on board a ship not registered in the United Kingdom, in which case the duty to comply with Part III of the regulations is put on somebody other than the owner of a ship—namely, the master. In those circumstances, I think that that point fails, for I cannot see that if, without any notice or knowledge, an employee was without authority using a rope which did not belong to C D E F G H

the defendants, there was any duty on them to examine or test it, and, in fact, they did not know of its faulty condition.

Judgment for the defendants with costs.

Solicitors: *Silverman & Livermore* (for the plaintiff); *Lightbounds, Jones & Co.* (for the defendants); *Bramwell, Clayton*, Newcastle-on-Tyne (for the third parties).

[*Reported by M. D. CHORLTON, Barrister-at-Law.*]

B EAST SUFFOLK RIVERS CATCHMENT BOARD v. KENT AND ANOTHER.

[HOUSE OF LORDS (Viscount Simon, L.C., Lord Atkin, Lord Thankerton, Lord Romer and Lord Porter), **June 10, 11, 12, 13, 17, 18, 19, 20, 26, December 9, 1940.**]

C *Land Drainage—Catchment board—River-wall—Duty to repair—Liability for misfeasance—Negligent repair—Land Drainage Act, 1930 (c. 44), s. 34.*

D The respondents were the owners of land protected by a wall from inundation by a tidal river. At a time when the height of a spring flood tide was increased by a northerly gale, the wall partly collapsed, leaving a breach 20 ft. to 30 ft. wide. As a result, the respondents' lands were flooded. The appellants, the catchment board for the area in which those lands were situated, attempted to repair the breach by running a dam straight across it. It was proved that this method of repair was impracticable and that the correct method was to construct a V-shaped dam. It was also proved that the appellants had attempted the work with an insufficient number of men :—

E HELD (LORD ATKIN *dissenting*): since the damage done by flooding was not due to the exercise of the appellants' statutory powers, but to the forces of nature, which the appellants were endeavouring to counteract, they were under no liability to the respondents. Where a statutory authority are entrusted with a mere power, they cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If, in the exercise of their discretion, they embark upon an execution of the power, the only

F duty they owe to any member of the public is not thereby to add to the damage which he would have suffered had they done nothing. So long as they exercise their discretion honestly, it is for them to determine the method by which, and the time within which, and the time during which, the power shall be exercised, and they cannot be made liable for any damage which would have been avoided had they exercised their discretion in a more reasonable way.

G *Decision of Court of Appeal ([1939] 4 All E.R. 174) reversed.*

[EDITORIAL NOTE. It is now definitely settled that the Land Drainage Act, 1930, s. 34, does not place upon a catchment board an imperative duty to repair a breach in a drainage work, but gives the board permissive power to do so. The principal matter considered here is the nature of the duty owed by the board to

H those protected by such a work in a case where they decide to exercise such permissive power. Are they bound, if they do exercise that power, to exercise it with efficiency and despatch or are they under no such duty to neighbouring owners so protected by the work? Their Lordships state the result of their consideration of the case in varying language, but it seems that the board are only liable in a case where what they do causes additional damage to the person protected.

AS TO DUTIES OF CATCHMENT BOARDS, see HALSBURY, Hailsham Edn., Vol. 30, pp. 76-79, paras. 143-148; and FOR CASES, see DIGEST, Supp., Sewers and Drains, No. 399a *et seq.*

Cases referred to:

- (1) *Smith v. Cawdle Fen, Ely (Cambridge), Comrs.*, [1938] 4 All E.R. 64; Digest Supp.; 160 L.T. 61.
- (2) *Gillett v. Kent Rivers Catchment Board*, [1938] 4 All E.R. 810; Digest Supp. A
- (3) *Great Central Ry. Co. v. Hewlett*, [1916] 2 A.C. 511; 38 Digest 354, 594; 85 L.J.K.B. 1705; 115 L.T. 349.
- (4) *Geddis v. Bann Reservoir Proprietors* (1878), 3 App. Cas. 430; 43 Digest 1075, 116.
- (5) *Munday (J. R.), Ltd. v. London County Council*, [1916] 2 K.B. 331; 36 Digest 122, 812; 85 L.J.K.B. 1509; 115 L.T. 99. B
- (6) *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan*, [1934] A.C. 1; Digest Supp.; 102 L.J.P.C. 123; 149 L.T. 526; 26 B.W.C.C. 463.
- (7) *Sheppard v. Glossop Corpn.*, [1921] 3 K.B. 132; 38 Digest 34, 207; 90 L.J.K.B. 994; 125 L.T. 520.
- (8) *Boulton v. Crowther* (1824), 2 B. & C. 703; 38 Digest 28, 157; 2 L.J.O.S.K.B. 139. C
- (9) *Southampton & Itchin Floating Bridge & Roads Co. v. Southampton Local Board of Health* (1858), 8 E. & B. 801; 38 Digest 19, 103; 28 L.J.Q.B. 41; *sub nom. Itchin Bridge Co. v. Southampton Local Board of Health*, 30 L.T.O.S. 256.
- (10) *Whitehouse v. Fellowes* (1861), 10 C.B.N.S. 765; 38 Digest 40, 240; 30 L.J.C.P. 305; 4 L.T. 177. D
- (11) *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93; 38 Digest 35, 209; 35 L.J.Ex. 225; 14 L.T. 677; *affg. S.C. sub nom. Gibbs v. Liverpool Docks Trustees* (1858), 3 H. & N. 164; and *S.C. sub nom. Mersey Docks & Harbour Board v. Penhallow* (1861), 7 H. & N. 329.
- (12) *Milward v. Redditch Local Board of Health* (1873), 21 W.R. 429; 26 Digest 34, 651. E
- (13) *Roberts v. Charing Cross, Euston & Hampstead Ry. Co.* (1903), 87 L.T. 732; 42 Digest 723, 1423.
- (14) *East Fremantle Corpn. v. Annois*, [1902] A.C. 213; 38 Digest 28, 158; 71 L.J.P.C. 39; 85 L.T. 732.
- (15) *Howard-Flanders v. Maldon Corpn.* (1926), 135 L.T. 6; Digest Supp.
- (16) *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works*, [1898] 2 Ch. 603; 26 Digest 488, 1997; 67 L.J.Ch. 657; 79 L.T. 132. F
- (17) *M'Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562; Digest Supp.; 101 L.J.P.C. 119; 147 L.T. 281.
- (18) *Weld-Blundell v. Stephens*, [1920] A.C. 956; 36 Digest 126, 837; 89 L.J.K.B. 705; 123 L.T. 593.
- (19) *Cobb v. Great Western Ry. Co.*, [1893] 1 Q.B. 459; 36 Digest 26, 135; 62 L.J.Q.B. 335; 68 L.T. 483; *affd.*, [1894] A.C. 419. G
- (20) *Caswell v. Powell Duffryn Associated Collieries, Ltd.*, [1940] A.C. 152; [1939] 3 All E.R. 722; Digest Supp.; 108 L.J.K.B. 779; 161 L.T. 374.

APPEAL by the East Suffolk Rivers Catchment Board from a judgment of the Court of Appeal, dated Nov. 3, 1939, and reported *sub nom. Kent and Porter v. East Suffolk Rivers Catchment Board*, [1939] 4 All E.R. 174, affirming a judgment of HILBERY, J., dated Mar. 22, 1939, and reported *sub nom. Kent and Porter v. East Suffolk Rivers Catchment Board*, [1939] 2 All E.R. 207, where the facts are fully set out. H

Gilbert Beyfus, K.C., and F. W. Beney for the appellant catchment board.

G. Russell Vick, K.C., and Robert Fortune for the respondents.

Viscount SIMON, L.C. : My Lords, on Dec. 1, 1936, there was an exceptionally high spring tide on the coast of Suffolk, and this, reinforced by the influence of a northerly gale, caused the waters of the River Deben (which is tidal below Woodbridge) to rise so high as to wash over and break through in many places the ancient walls or banks, made of clay and stone, which ordinarily prevent the flooding of the adjoining marshland. The marshland inside the walls is at a lower level than ordinary high tides, and, consequently, if a breach is made in the walls, the tidal water which enters will keep the marsh pastures flooded until the gap in the wall has been stopped and the invading water has been drained away. There were no less than 22 breaches caused by this high tide in the walls of the River Deben alone, with the result that very extensive flooding took place. One of the most serious floodings occurred through a breach, estimated to measure 20 ft. or 30 ft. across, in the wall which guarded the marsh pastures of a farm belonging to the respondent Porter, of which the respondent Kent was the occupier. Some 50 acres of these pastures became and continued thus flooded.

The appellants are the catchment board, constituted under the Land Drainage Act, 1930, for the main rivers of East Suffolk, and the River Deben is one of these. By sect. 6 of the Act, the catchment board exercises the powers conferred by the Act on drainage boards so far as concerns the main rivers, including the banks thereof, and drainage works in connection with the main rivers. These powers, by sect. 34 (i) (a), include the power to repair any existing watercourse or drainage work, and the interpretation section (sect. 81) makes it plain that this includes the repair of such walls or banks as guarded the respondent's farm until they were broken through. The statement of claim contained the allegation that the appellants were under a duty to keep the respondents' walls in efficient condition, and, if a breach occurred, were under a duty "efficiently and with the utmost expedition" to repair any breach. This contention was, however, rejected by HILBERY, J., who tried the case, and, in taking this view, which is plainly right, the judge was following and approving previous decisions by DU PARCQ, J., in *Smith v. Cawdle Fen, Ely (Cambridge), Comrs.* (1) and STABLE, J., in *Gillett v. Kent Rivers Catchment Board* (2), at pp. 813, 814. Before the Court of Appeal, the respondents no longer contended that the Land Drainage Act, 1930, imposed on the appellants a positive duty to intervene and undertake the repair of any breach, and the argument there and before this House has proceeded on the basis that the appellants had statutory power to intervene, but were not under a duty to do so which could be enforced by action. It is to be noted,

however, that, under sect. 12, a catchment board which fails to exercise its powers may, in certain circumstances, be directed by the Minister of Agriculture and Fisheries with respect to the performance of its statutory functions.

If, therefore, the appellant board had remained entirely passive, it is agreed that the respondents could not have succeeded in any action against them for non-feasance. However, the appellants did not remain inactive, but endeavoured to deal with all the breaches which had taken place in their area, amounting to about 30 in number, including the serious breach in the wall skirting the respondents' land. In the other cases, on the River Deben, the appellants seem to have been successful, but HILBERY, J., has found, and, following the Court of Appeal, I am prepared to accept his finding on the facts, that the methods adopted and the staff employed in trying to repair the damage to the wall with which we are concerned in this case were so inefficient that, whereas the gap could, by the exercise of reasonable skill, have been closed and the flooding arrested in 14 days, this result was not in fact attained till after the lapse of 164 days. In the meantime, of course, the marsh pastures remained covered by salt water, and the respondents continued to suffer the damage which had been initiated by the breach in the wall. For the purpose of deciding the difficult and important issue of principle which now arises, details as to the appellants' unsuccessful efforts do not matter, but it is convenient to state that it was only at the third attempt that the gap was successfully filled, and that, in the view of the judge, who had a body of expert evidence before him, the earlier efforts of the appellants, which consisted in attempting to build straight across the gap instead of building a semi-circular bastion out into the saltings and then reconstructing the wall behind this protection, had only the remotest possibility of success, and caused the delay.

The problem of law which now arises for solution is by no means an easy one. Its essential elements are these: (i) The appellant board were under no statutory duty to repair the breach, but they had the power to enter upon the land for the purpose of endeavouring to effect such repair, and they did so enter. (ii) It was the original breach in the wall, caused by the act of nature, which produced the flooding of the respondents' land, and it was the operations of the tide which kept it flooded. The efforts of the appellants were directed to abating this damage. (iii) If the appellants had not shown such want of skill in trying to repair the wall, and if they had been served by an adequate and well-trained staff, the gap in the wall would have been closed much sooner than it was, and the flooding would have been more promptly abated. The question is whether, in the above circumstances, the appellants are liable to the respondents in damages to such amount as would represent the net loss to the respondents due to the delay in abating the flood. The Court of Appeal were divided on this issue.

SLIESSER and MACKINNON, L.JJ., thought that the appellants were liable as for breach of duty to do their work with reasonable care and expedition. DU PARCQ, L.J., differed, and held that the appellant board was [p. 183]:

A . . . not liable for damage suffered through failure to exercise its powers adequately, or at all, even though the damage might have been averted or lessened by the exercise of reasonable care and skill.

B It is not, of course, disputed that, if the appellants, in the course of exercising their statutory powers, had inflicted fresh injury on the respondents through lack of care or skill, they would be liable in damages for the consequences of their negligent act. If, for example, the appellants by their unskilful proceedings had caused a further area of the respondents' land to be flooded, or had prolonged the period of flooding beyond what it would have been if they had never interfered, they would be liable. Apart from two minor matters, however, which C it is agreed do not govern the main issue, nothing of this sort happened. The respondents would have gained if the flooding had been stopped sooner. Their complaint against the appellants is that they did not act with sufficient skill to stop it more promptly, but they cannot point to any injury inflicted upon them by the appellant board, unless it be D the board's want of success in endeavouring to stop the flooding at an earlier date.

E In order that the respondents should succeed in this action, it is necessary that they should establish, not only that the appellants were wanting in care and skill when exercising their statutory powers, but that they inflicted injury and loss upon the respondents by their negligence. LORD PARKER OF WADDINGTON thus states the proposition in *Great Central Ry. Co. v. Hewlett* (3), at p. 519:

F It is undoubtedly a well-settled principle of law that when statutory powers are conferred, they must be exercised with reasonable care so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damages for negligence may be recovered

G In the present case, the damage done by the flooding was not due to the exercise of the appellants' statutory powers at all. It was due to the forces of nature, which the appellants, albeit unskilfully, were endeavouring to counteract. Supposing, for example, that, after the appellants had made their first unsuccessful attempt, they had decided to abandon their efforts altogether, the respondents could have had no legal claim against them for withdrawing, even though the result might have been to leave the respondents' land indefinitely flooded. H This shows, I think, how different is the relation between the catchment board and individual owners or occupiers like the respondents and the relation between a contractor employed by the respondents to mend the wall. In the latter case, the respondents would have a remedy in damages if the contractor did not exercise reasonable skill and promptness in discharging his task, and if damage resulted; but in the former

case the catchment board has its responsibilities over the whole of its area to consider. It may be that in its judgment it is necessary to use its skilled staff in mending other breaches. It may be that the outlay involved in making a good job of one particular repair is more than its limited finances will permit. The Land Drainage Act, 1930, Part IV, contains financial provisions. Without setting these out at length, it is sufficient to say that the expenses of the catchment board are met by the issue of precepts to the county council and, it may be, to certain other local bodies, but that the statute puts limits to the amounts thus raised. DU PARCQ, L.J., in his dissenting judgment, points out that, when Parliament has left it to a public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, this may raise [p. 184]:

... a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift.

Reference was made during the argument, as was natural, to the well-known words of LORD BLACKBURN in *Geddis v. Bann Reservoir Proprietors* (4), at p. 455:

I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently.

By these words, LORD BLACKBURN would certainly not wish to be understood as saying that such an action would lie in the absence of proof that the defendant's negligence caused damage. Indeed, negligence in such a connection involves the twofold conception of want of care on the part of the defendant and the consequential infliction of loss upon the plaintiff. As the EARL OF READING, L.C.J., observed in *Munday (J. R.), Ltd. v. London County Council* (5), at p. 334:

Negligence alone does not give a cause of action, damage alone does not give a cause of action; the two must co-exist.

A third essential factor is the existence of the particular duty. As LORD WRIGHT expressed it in *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (6), at p. 25:

In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission: it properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing . . .

Moreover, as SCRUTTON, L.J., has pointed out in *Sheppard v. Glossop Corpn.* (7), at pp. 145, 146, the passage from the opinion of LORD BLACKBURN must be read in the context in which it was pronounced. I agree with DU PARCQ, L.J., that it would be misapplied if it were supposed to support the proposition that a public body, which owes no duty to render any service, may become liable at the suit of an individual, if once it takes it upon itself to render some service, for

other hand, if the public body by its unskilful intervention created new dangers or traps, it would be liable for its negligence to those who failing to render reasonably adequate and efficient service. On the suffered thereby. In *Sheppard v. Glossop Corpn.* (7), SCRUTTON, L.J., has a passage which makes the same distinction. That case was concerned with a local authority upon which Parliament had conferred a discretionary power of lighting, and SCRUTTON, L.J., said, at. p. 149 :

If they do light they will be liable in damages for negligence in lighting ; negligence in allowing gas or electricity to escape ; negligence in putting posts in a highway without warning, and negligence in placing traps and dangers in the streets and not lighting them at night. But they are not liable merely because in the exercise of their discretion they do not light, or because they discontinue lighting, dangers which they have not themselves created.

These considerations lead to the conclusion that the respondents' claim is ill-founded. They have suffered damage by the flooding of their land during four months or more. They seek to recover compensation from the appellants for all of this loss except the first fortnight. However, the appellants did not cause the loss. It was caused by the operations of nature which the appellants were endeavouring, not very successfully, to counteract. It is admitted that the respondents would have no claim if the appellants had never intervened at all. In my opinion, the respondents equally have no claim when the appellants do intervene, save in respect of such damage as flows from their intervention and as might have been avoided if their intervention had been more skilfully conducted. In my opinion, therefore, the appeal should be allowed.

LORD ATKIN [read by LORD PORTER]: My Lords, two material points emerged on the argument of this appeal—namely, (i) was there a duty owed to the plaintiffs, and, if so, what was its nature ? and (ii) if there was a duty owed to the plaintiffs to conduct the work with reasonable despatch, was there any damage caused to the plaintiffs by the breach of the duty ? On the first point, I cannot help thinking that the argument did not sufficiently distinguish between two kinds of duties—namely, (i) a statutory duty to do or abstain from doing something, and (ii) a common law duty to conduct yourself with reasonable care so as not to injure persons liable to be affected by your conduct.

The duty imposed by statute is primarily a duty owed to the state. Occasionally penalties are imposed by the statute for breach, and, speaking generally, in the absence of special sanctions imposed by the statute, the breach of duty amounts to a common law misdemeanour. The duty is not necessarily a duty owed to a private citizen. The duty may, however, be imposed for the protection of particular citizens or classes of citizens, in which case a person of the protected class can sue for injury to him due to the breach. The cases as to breach of the Factory or Coal Mines Acts are instances. As a rule, the statutory

duty involves the notion of taking care not to injure, and in such cases actions for breach of statutory duty come within the category of negligence: *Lochgelly Iron & Coal Co., Ltd. v. M'Mullan* (6).

Apart from the existence of a public duty to the public, however, every person, whether discharging a public duty or not, is under a common law obligation to some persons in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care. This duty exists whether a person is exercising a public duty or merely exercising a power which he possesses either under statutory authority or in pursuance of his ordinary rights as a citizen. To whom the obligation is owed is, as I see it, the principal question in the present case. For the existence of the duty and the nature of it in the case of statutory duties or powers there is abundant authority, most of which was cited. I do not propose to discuss them, but will mention the following cases.

Boulton v. Crowther (8), a case of trustees acting under a Turnpike Act. ABBOTT, C.J., said, at p. 707:

If, in doing the act, they acted arbitrarily, carelessly, or offensively, the law in my opinion has provided a remedy.

Southampton & Itchin Floating Bridge & Roads Co. v. Southampton Local Board of Health (9). Demurrer was overruled in a case where the declaration alleged that the defendants conducted themselves so wrongfully, improperly, and negligently and with such want of due and proper care as to injure the plaintiffs.

Whitehouse v. Fellowes (10), another case of negligence by trustees under a Turnpike Act, where WILLIAMS, J., said, at p. 780:

It may be observed that the act I have supposed to be done by the trustees is one which must necessarily produce damage whether done carefully or not—but the qualification put in the case is this that if the act authorised to be done by the trustees is done so carelessly or improperly that the careless or improper manner in which it is done creates or increases the damage the trustees will be liable.

Mersey Docks Trustees v. Gibbs (11) and *Geddis v. Bann Reservoir Proprietors* (4), where LORD BLACKBURN said, at p. 456:

... I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently.

Milward v. Redditch Local Board of Health (12):

No right to make improvements in a way calculated to cause unnecessary injury to the plaintiff. To this principle there is however one qualification which is well settled and indeed is admitted by the defendants that in carrying out works authorised by statute you must not act negligently.

Roberts v. Charing Cross, Euston & Hampstead Ry. Co. (13), a railway company restrained from working by night so as to disturb plaintiff, "must not act unreasonably, arbitrarily, wantonly or offensively."

East Fremantle Corpn. v. Annois (14), where LORD MACNAGHTEN accepts ABBOTT, C.J.'s, statement in *Boulton v. Crowthor* (8).

Howard-Flanders v. Maldon Corpn. (15), where SCRUTTON, L.J., at p. 11, selects a passage from LORD COLLINS in *Southwark & Vauxhall Water Co. v. Wandsworth Board of Works* (16) :

A Merely an assertion of the proposition so frequently affirmed that where statutory rights infringe upon what but for the statute would be the rights or other persons they must be exercised accordingly so as to do as little mischief as possible.

B Finally I would refer to *Sheppard v. Glossop Corpn.* (7), where the decision was based upon an acceptance of the proposition that an undertaker is liable if he exercises a power negligently, but is not liable for refusing to exercise the power though it might be reasonable to do so. I was a party to that decision, and will not cite any remarks of BANKES, L.J., or myself, but will refer to words taken from SCRUTTON, L.J., at pp. 145, 146 :

C But it is going far beyond LORD BLACKBURN'S dictum to say that because, when an option is given by statute to an authority to do or not to do a thing and it elects to do the thing and does it negligently, it is liable, therefore it is liable if it elects not to do the thing, which by the statute it is not bound to do at all.

D I treat it, therefore, as established that a public authority, whether doing an act which it is its duty to do or doing an act which it is merely empowered to do, must, in doing the act, do it without negligence, or, as it is put in some of the cases, must not do it carelessly or improperly. Quite apart from a duty owed to a particular individual, which is the question in this case, I suggest that it would be difficult to lay down that a duty upon a public authority to act without negligence or not carelessly or improperly does not include a duty to act with reasonable diligence, by which I mean reasonable despatch. I cannot imagine this House affording its support to a proposition so opposed to public interests where there are so many public bodies exercising statutory powers and employing public money upon them. I myself have been unable to think of any case where a duty to perform a continuous operation with reasonable care—i.e., without negligence—does not involve an obligation to perform it with reasonable despatch. Of course, what is reasonable means reasonable in all the circumstances of the particular case.

H I thus come to the crucial point in this case. To whom is such a duty owed, or who can complain of the failure to use reasonable despatch? It must be conceded that instances will occur of the performance of powers where it might be difficult for a member of the public generally to complain of unreasonable delay. For instance, delay in the work of relaying the surface of a highway may not be actionable at the suit of members of the public who are put to expense and inconvenience by having to make a detour. Even in this case I think something might be said for a householder or shopkeeper on

the route under repair who is for an unreasonably long time deprived of access to his premises for himself and his customers. However, we have to deal here with relations between the plaintiffs and the board, which I suggest are much closer than the general relations of members of the public to a public authority. The board were engaging themselves in repairing the plaintiffs' wall with the object of preventing the further flooding of the land of the plaintiffs and I think also one other occupier, and they were operating upon the plaintiffs' land. Subject to what I have to say upon the causation of damage, which I wish for the present purpose to assume, they would know that, the longer the work was delayed, the longer would the waters ebb and flow over the land, with the possibility of damage therefrom. I submit that these relations give rise to a duty owed to the plaintiffs to use reasonable care including despatch, in doing the work. Indeed, over and over again the appellants' counsel admitted that, if and so far as their work was conducted with such unreasonable delay as to deprive the plaintiffs of the use of their land, owing to occupation by the board's workmen or materials, there would be a good claim for damage. This admits a duty owed to the plaintiffs in respect of despatch, and this controversy is confined to the extent of the duty and the injury caused by it. It is in respect of this use of the plaintiffs' land that the question as to the power of the plaintiffs to do the work themselves becomes at all relevant. I feel sure that the reference to this in the judgment of SLESSER, L.J., was misunderstood in the appellants' argument. It is not that the board owed a duty to the plaintiffs, because the plaintiffs could have done the work themselves. I think that the argument is that the board came upon the plaintiffs' land to do work which the plaintiffs could have done themselves, and that that circumstance indicates a relationship which supports a duty owed to the plaintiffs to do the work with reasonable despatch. I do not wish to refer in detail to *M'Alister (or Donoghue) v. Stevenson* (17), but I venture to think that the principles there accepted by the majority of this House give guidance on this part of the case.

I now come to the second part of the case—namely, whether, if there existed any duty owed by the board to the plaintiffs to conduct the work with reasonable despatch, there was any damage caused by the breach. I would begin by noting that there is in pleading no difference between actions of contract or tort as to the allegation of the cause of damage. "Per quod," or, as in *BULLEN AND LEAKE ON PLEADING*, "whereby," is the conventional averment that damage resulted from an infringement of a right of the plaintiff, whether based on contract or tort. This merely illustrates the legal position. In *Weld-Blundell v. Stephens* (18), at p. 979, LORD SUMNER cited *Cobb v. Great Western Ry. Co.* (19), at p. 337 :

The damage must be such as would flow from the breach of duty in the ordinary and usual course of things. That is the general rule both in contract and in tort, except that in contract the law does not consider as too remote such damages as were in the contemplation of the parties at the time when the contract was

made. Subject to that, only such damages can be recovered as were immediately and naturally caused by the breach.

The doubt which has arisen in the present case is as to whether the particular damage relied on by the plaintiffs was caused by the breach. The flood, it is said, broke down the plaintiffs' wall. The flow of water
A over their land was caused by the flood. The defendants were engaged in preventing similar damage from happening again to the plaintiffs, and nothing they did or omitted to do caused the damage complained of. I venture to think that this does not quite meet the plaintiffs' point. I understand them to say: "True ~~it~~ is that we cannot complain
B of the original flooding, and we must put up with the damage which resulted from the ebb and flow of the water over our lands for a certain time—namely, the time which would expire before our wall was repaired, once you had begun to repair it, with reasonable despatch— x days. On the assumption now made, however, you were under a duty to us
C to use reasonable despatch, and the water ebbed and flowed over our land for a far longer period, $x + y$ days, and we have suffered damage from the presence of water for this $x + y$ period greater than the damage we would have suffered from the x period alone." If the plaintiffs can prove this, it seems inevitable that the extra damage is
D directly caused by the breach complained of. Let me introduce a hypothetical case of a contractual duty, assuming, as I do, that the causation of damage is the same in contract and tort. Assume that a shopkeeper had his roof injured in rainy weather, so that the rain came in upon his goods, and that he contracted with a builder to
E repair it, with an express term that work should proceed without unreasonable delay. If the builder were guilty of unreasonable delay whereby the rain beat upon the shopkeeper's goods for, say, 14 days instead of 4 days, would not the shopkeeper be able to recover such damages as he could show resulted from the excess exposure, showing
F possibly that his goods could stand 4 days' exposure with little damage, but could not stand the extra 10 days? I think that this would be a plain case, and it would not depend upon an obligation to complete the work. The builder might be protected from an obligation to complete by subsequent conditions, death, strikes, war and the like,
G but, for such damage as would be shown to be due to delay in the work while it was being performed, I conceive he would clearly be liable. Such damage would be caused by the delay in repair, notwithstanding that the original cause of damage, the rain, and its continuance were in no way caused by the builder. I suggest, therefore, that, if the plaintiffs
H could prove the case indicated above, they should succeed. I appreciate that there is very slight evidence at present in support of this case, and I should not myself be prepared to accept the judge's suggestion, if that is what he really intended at p. 225 of his judgment, that on each day after the end of 14 days the flooding caused fresh damage. However, it would obviously be impossible, in a case where, to avoid expense,

the parties had agreed not to try the question of damages at the hearing; to dismiss a case for want of satisfactory proof of damage. I should be quite content to direct the judge to consider whether any damage at all of this kind was proved on the hearing of the damages issue, and, if he found substantially none, then to give judgment in the result for the defendants. I think the costs in such a case should probably be reserved. A
On the questions, however, argued before us, I think that our decision should be for the plaintiffs.

LORD THANKERTON: My Lords, I have had the privilege of considering the opinions prepared by your Lordships, and, while I agree B
with the majority of your Lordships that the appeal should be allowed, I desire to state in my own way the principles, and their application to the present case, which have led me to that conclusion. It is admitted that the Land Drainage Act, 1930, did not impose a positive C
duty to undertake the repair of breaches in the walls and banks of the main river on the appellants, but conferred on them power to undertake such repair, and to enter upon lands belonging to another for that purpose. It is clear to me that the appellants owed no duty to the respondents unless and until they actually entered on their land and commenced operations for repair of the breach. I am equally D
clear, however, that, as soon as they entered upon the land and commenced operations, the appellants owed a duty to the respondents to conduct such operations with such reasonable care as would avoid causing damage to the respondents' property, and that they would be E
liable to the respondents if the latter could show (i) absence of such reasonable care in the conduct of the operations, and (ii) that they had suffered loss which was caused by such lack of reasonable care.

On the question of existence of a duty, it seems to me to be impossible to maintain that Parliament intended to authorise the appellants to cause damage to the respondents by want of ordinary care in their F
operations on the respondents' property. I must make clear, however, that, in my opinion, that duty only relates to the operations which they actually perform on the respondents' land. If the appellants chose to abandon the operations when only partly complete, they would be, in my opinion, entitled to do so, and would be under no liability to the G
respondents for such cessation, except in so far as the partly completed works might constitute a danger leading to damage. This is clearly stated by SCRUTTON, L.J., in *Sheppard v. Glossop Corpn.* (7), at p. 149. This discretion as to abandonment of the operations is in marked distinction to the case of a positive statutory duty to undertake the repair H
and the cases of a contractual undertaking to do the work.

The next question is as to the standard of care which will constitute reasonable care. Your Lordships have had occasion recently to point out once more that the standard necessarily varies according to circumstances: *Caswell v. Powell Duffryn Associated Collieries, Ltd.* (20). It

does appear to me that there are special circumstances in the case of statutory bodies such as the appellants which should lead to the application of a somewhat less exacting standard than ordinarily prevails. The actions of the waters, with the depredations of which they are intended to deal, are uncertain and incalculable, and the provision of staff, plant and material adequate to deal with sudden emergencies, let alone their somewhat cramped financial resources, presents great difficulty, and, when one adds the importance and the urgency of remedial measures, it does seem to me that much may be condoned as well-meant error of judgment which, in other circumstances, might be considered as unjustifiably risky. I feel bound to make these observations for future guidance, although in the present case, keeping them fully in mind, I am unable to find that HILBERY, J., was not entitled to hold that the appellants committed a breach of their duty to the respondents in adopting a method of repair which no reasonable man would have adopted. It was in this view that I have felt throughout that the only real question in this appeal relates to causation, and the difficulty arises from the fact that, prior to the intervention of the appellants, a source of damage had been already created by the action of the flood waters, and that that source continued to be available—at least in some measure—until it was at long last excluded by the operations of the appellants. The point on which admittedly the success or failure of the appeal depends is whether the failure of the appellants to close the breach sooner by an efficient method can be held as the *causa causans* of the damage which accrued during these extra days, to the exclusion of the flood breach as a cause of the damage. However, it was in fact still the action of the water, rendered possible by the original breach, which caused the damage during these days, and failure to stop such action of the water cannot alter the fact that it is the water coming through the breach which causes the damage. I am accordingly of opinion that the respondents have failed to make a case sufficient to establish the essential link between the breach of duty found by the judge and the main damage of which they complain, and that the appeal should be allowed.

LORD ROMER: My Lords, the respondents by their statement of claim in the action alleged that, after the river had broken through their wall, the defendants, “as was their duty,” commenced to repair the wall, but, in breach of their duty, failed to do the same efficiently and with the utmost expedition possible, in consequence of which breach of duty the flooding of the respondents’ marshland continued for many months. The respondents, in other words, were contending that, by virtue of the Land Drainage Act, 1930, the appellants had a duty, and not merely a power, to repair the wall in question. At the trial of the action, this contention was rejected by HILBERY, J., and neither in the Court of Appeal nor before this House was the decision of the judge

upon this point in any way challenged. What, however, the respondents did contend was that, though not imposed upon the appellants by the Act, such a duty was nevertheless imposed upon them by the common law the moment they began to exercise their statutory power of repairing the wall. It is not, and cannot be, said that the duty arose from any contract between the parties, express or implied, nor is it said that it can be treated as existing by an application of the law of estoppel, for there is no evidence that would justify a finding of the existence of any such contract or of any such estoppel. The duty is said to be imposed by the common law of England. A

My Lords, it has been laid down time and again that, in exercising a power which has been conferred upon it, a statutory authority is under an obligation not thereby—*i.e.*, by the exercise of the power—to inflict upon others any damage which may be avoided by reasonable care. I know of no authority, however, for the proposition that, in selecting the time within which, the extent to which, and the method by which, its statutory power is to be exercised, it owes any duty whatsoever. There is, indeed, as I will point out later, a decision of the Court of Appeal in England which is inconsistent with such a proposition. Nevertheless, this is the proposition which is involved in the respondents' contention in the present case. They allege—and, for myself, I think that they have proved—that the appellants, until they eventually embarked upon the construction of the V-shaped dam, selected a method of repairing the respondents' wall which, in view of the labour and materials at their disposal, was one that no reasonable man would have adopted. The result was that the sea-water continued to flow through the breach in the wall and that the respondents' marshland continued to be flooded for a longer time than would have been the case had the appellants acted more reasonably, and I will assume that, by reason of this, the respondents suffered material damage. Had the Land Drainage Act, 1930, imposed upon the appellants the duty of repairing the wall, instead of merely conferring upon them the power of doing so, they could, without question, have been made liable for this damage, for they would in that case have been under the obligation of effecting the repair with all reasonable skill and diligence, and they would have committed a breach of such obligation had there been any unreasonable delay in effecting the repair, whether such delay was due to an unreasonable time being taken in beginning the work or in the course of carrying it out or to their having adopted an unreasonable method of repair. However, the Act imposed upon the appellants no duty of repairing the wall. It merely gave them the power of doing so. Whether or not they should exercise that power was a matter entirely within their own discretion, unless and until the Minister of Agriculture intervened under sect. 12 of the Act. Had they determined not to effect the repair at all, or not to embark upon the work until, say, the end of the following March, the respondents would have had no cause of action for the B C D E F G H

- damage entailed upon them by such decision. No one could successfully have contended that, in the latter case, any extra damage occasioned to the respondents by reason of the breach in the wall remaining open to the sea between Dec. 1 and the end of March was due to the negligent exercise by the appellants of the power conferred upon them by the Act. Upon what principle, then, can the appellants be made responsible for such damage merely by reason of the fact that they occupied the intervening time in making a futile attempt to effect the repair by a method which any reasonable person ought to have realised had no prospect of success? Supposing, moreover, that, after having embarked upon the work of repair on Dec. 2 (as the appellants in fact did, when Studd, upon the instructions of Clark, started a quite ridiculous attempt to fill up the breach by throwing into it bags of clay), Clark had then decided that, in view of the material and labour at his disposal, it would be better to refrain from any further attempts at repair for the moment, upon what principle could the appellants have been held responsible for any damage caused by the delay?

- My Lords, the respondents' answer to these questions which I have just propounded is: "The principle enunciated by LORD BLACKBURN in *Geddis v. Bann Reservoir Proprietors* (4), at pp. 455, 456." It was in these words:

- ... I take it, without citing cases, that it is now thoroughly well established that no action will lie for doing that which the legislature has authorised, if it be done without negligence, although it does occasion damage to anyone; but an action does lie for doing that which the legislature has authorised, if it be done negligently. And I think that if by a reasonable exercise of the powers, either given by statute to the promoters, or which they have at common law, the damage could be prevented it is, within this rule, "negligence" not to make such reasonable exercise of their powers.

- It is plain, however, on a careful reading of this passage that the damage to which LORD BLACKBURN is referring is the damage which "it"—namely, the exercise of the power—occasions, and not damage which would in any case have been occasioned had the power never been exercised at all, or only exercised after a delay which might appear to be an unreasonable one. It is also to be observed that, in the case which was then before this House, the damages of which *Geddis* was complaining was damage which he would not have sustained had the statutory authority refrained from exercising its powers. It was damage inflicted upon him by reason of the fact that the authority did exercise its powers. Unless, in reading the words of LORD BLACKBURN, that circumstance be borne in mind, and unless the exact language which he used be closely scrutinised, his words are very liable to be misunderstood. It was because one Sheppard misunderstood them that he brought an action against the Glossop Corporation and was discomfited. The facts of *Sheppard v. Glossop Corpn.* (7), so far as material, were as follows. The corporation had the power of lighting the streets in their district, but were not under any obligation to do so. In exercise of this power,

they had erected a gas-lamp in a street known as Dun Lane, but on one Christmas night the lamp was extinguished by one of their servants soon after 9 p.m., in pursuance of a general order issued by them from motives of economy. Upon that evening, the unfortunate Sheppard had been paying a visit to a friend's house and left there at 11.30 p.m. His way home led him, or rather should have led him, along Dun Lane, A but, when nearing the lane, he found that the place was in complete darkness. The result was that he missed the proper entrance to the lane and wandered on to some adjoining land. He eventually arrived in the lane by falling over a retaining wall at its side, and was seriously injured. Feeling somewhat strongly, and not unnaturally, that any B lighting authority which turned off the lights on a Christmas night at the early hour of 9 p.m. was acting in a highly unreasonable manner, he sued the corporation for damages caused by their negligence. The action was tried before GREER, J., and resulted in judgment being entered for Sheppard. The judge found as a fact that the accident C would not have happened if the lamp had been lighted. The corporation, however, took the case to the Court of Appeal, and their appeal was allowed. It is interesting to note the contention put before that court by counsel for Sheppard, because it bears a very close resemblance to the argument advanced by the respondents on the appeal now before D your Lordships' House. "Assuming," said counsel, "that the appellants are under no duty, but are merely empowered, to light their district, and that, if they had never lighted Dun Lane, the respondent would have had no cause of action, yet, having taken it upon themselves to light this place, they were bound to light it adequately." In support of this E contention, he cited the words of LORD BLACKBURN in *Geddis v. Bann Reservoir Proprietors* (4), to which I have referred, and upon which the decision of GREER, J., had apparently been founded. The contention in effect was that, although a statutory authority may have been F given a power to do a particular thing without being placed under the obligation to do it, yet, the moment it sets about doing the particular thing, the statutory authority is in precisely the same position as it would have been in had the legislature originally imposed upon it the duty of doing it. The contention was rejected, and, in my opinion, G rightly rejected, by the Court of Appeal. BANKES, L.J., said, at p. 143 :

... the appellants have merely exercised the discretion vested in them by the legislature. They were under no obligation to place a lamp post at this particular spot; having placed it there they were not bound to keep it there; and if they kept it there they were not bound to supply it with gas, and are not to be made H liable for merely extinguishing the light at any particular hour.

In making these observations, BANKES, L.J., was not (as was made clear in an earlier part of his judgment) contemplating the case of a person being injured by running into an unlighted lamp which had been placed in the street by the corporation. The injury in that case would have

been caused directly by the exercise of the power. That is, it would not have been suffered at all had the corporation refrained from exercising the power. This distinction was very clearly pointed out by SCRUTTON, L.J. Referring to local authorities who have had conferred upon them a discretionary power of lighting, he said, at p. 149 :

A If they do light they will be liable in damages for negligence in lighting ; negligence in allowing gas or electricity to escape ; negligence in putting posts in a highway without warning, and negligence in placing traps and dangers in the streets and not lighting them at night. But they are not liable merely because in the exercise of their discretion they do not light, or because they discontinue lighting, dangers which they have not themselves created.

B In the same case, ATKIN, L.J., said, at p. 150 :

C There is no duty to exercise the power of lighting at all. Nor, if the local authority do light, are they obliged to light the whole of their district or any particular part of it. They are under no duty to light all dangerous places, or any dangerous place ; and if they do light a dangerous place for part of the night, they are not bound to light it during the whole night. In this particular case the local authority did not cause the danger ; it was already in existence . . .

My Lords, I have ventured to cite these passages at some length because they seem to lay down a principle which, in my opinion, is a thoroughly sound one. It is this. Where a statutory authority is entrusted with a mere power, it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise that power. If, in the exercise of their discretion, they embark upon an execution of the power, the only duty they owe to any member of the public is not thereby to add to the damages which he would have suffered had they done nothing. So long as they exercise their discretion honestly, it is for them to determine the method by which, and the time within which, and the time during which, the power shall be exercised, and they cannot be made liable, except to the extent which I have just mentioned, for any damage which would have been avoided had they exercised their discretion in a more reasonable way.

In the present case, the respondents in the exercise of their discretion selected, and for some time persisted in, a method of repairing the breach in the appellant's wall which no reasonable person would have adopted. I am willing to assume that the result of this was that the appellants were damaged by reason that the sea-water entered and remained upon their marshland for a longer period than it would have done had the respondents adopted the best method of effecting the repair. No one, however, can question, or has attempted to question, the respondents' honesty, and, in my opinion, they cannot be made responsible for that damage. This was the view of the matter which commended itself to DU PARCQ, L.J., and I respectfully agree with him. I would like in particular to express my concurrence in the following passage in his judgment, at p. 184 :

The law would perhaps be more satisfactory, or at any rate seem more satisfactory in some hard cases, if a body which chose to exercise its powers were

regarded as being in exactly the same position as one upon which an Act of Parliament imposed a duty. On the other hand, it must be remembered that when Parliament has left it to a public authority to decide which of its powers it shall exercise, and when and to what extent it shall exercise them, there would be some inconvenience in submitting to the subsequent decision of a jury, or judge of fact, the question whether the authority had acted reasonably, a question involving the consideration of matters of policy and sometimes the striking of a just balance between the rival claims of efficiency and thrift.

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My Lords, for these reasons, I would allow the appeal.

LORD PORTER : My Lords, in this case I have had the advantage of reading the opinion delivered by my noble and learned friend LORD ROMER, and, if we were not differing from the views of the Court of Appeal, I should be content to agree with the opinion he has expressed. Inasmuch, however, as I think that the appeal should be allowed, I consider it desirable that I should state very shortly why I have arrived at that conclusion. It is common ground that an Act of Parliament may either impose a duty upon a public or other body or may grant them powers to do an act without creating any obligation upon them to undertake the task. It is conceded that, whereas in the former case a body upon whom a duty is imposed must fulfil it with due care and expedition, in the latter case there is no obligation upon the body to do anything at all. If they choose, for any reason which commends itself to them, to leave the task unperformed, no remedy can be obtained, nor can any action be taken against them unless a right to do so is given by the Act which grants the power or by some other Act.

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In the present case, the Land Drainage Act, 1930, by the combined effect of sect. 6 and sect. 34 gave power to a catchment board to maintain existing works—that is to say, to drain, repair or otherwise maintain in a due state of efficiency any existing watercourse or drainage work—but imposed no duty to do so. If the appellants had taken no action when the respondents' bank was broken and the land was flooded, no complaint could have been made, nor, indeed, could any steps have been taken though the appellants had delayed before taking action, however long the delay might have been. All this is admitted on behalf of the respondents, but it is contended that, once the appellants chose to intermeddle by undertaking the work, they then were in the same position as if a duty had originally been imposed upon them. A power exercised is said to be the same as a duty imposed. In the present case, the appellants did undertake the task of repairing the breach, and I see no reason for differing from the finding of the judge and of the Court of Appeal that, in carrying out the work, they acted negligently and slothfully. If, then, their acceptance of the task imposed a liability to carry it out with care and circumspection, I should hold them liable for failure to perform what they had undertaken. Once they had taken action, it was, I think, clear that they were under some obligation to the owner of the land upon which their operations were being carried out. The question is, not as to its existence, but as to its extent.

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The appellants acknowledged their liability for any damage directly due to the action which they took. Under a proper plea, they said, an increase in the amount of soil scoured out by the ebbing and flowing of the flood or damage caused by sacks and soil spread over the respondents' land due to the appellants' activities would form a proper head of
 A damage, but no such claim was made. The only loss complained of was that, owing to the negligent delay in repairing the breach, the respondents' land was flooded for a longer period than it should have been.

Damage caused by anything negligently done by the appellants in the course of the exercise of their power which would not have occurred
 B if they had refrained from exercising it at all would undoubtedly have to be made good, on the principles set out in the well-known words of LORD BLACKBURN in *Geddis v. Bann Reservoir Proprietors* (4), at pp. 455, 456, already quoted by LORD ROMER, but, where, as here, the damage was not
 C caused by any positive act on the part of the appellants, but was caused and would have occurred to the like extent if they had taken no steps at all, I cannot see that the loss which the respondents suffered was due to any breach of a duty owed by the appellants. Their duty was to avoid causing damage, not either to prevent future damage due to causes for which they were not responsible or to shorten its incidence.
 D The loss which the respondents suffered was due to the original breach, and the appellants' failure to close it merely allowed the damage to continue during the time which they took in mending the broken bank. For that I do not think them liable, nor can I find any case the decision in which would lead to that result.

E The principle expressed by LORD BLACKBURN does not depend upon his statement alone. It is to be found in cases decided before his time, and has been repeated many times since. Indeed, in the other case referred to by my noble and learned friend LORD ROMER, *Sheppard v. Glossop Corpn.* (7), SCRUTTON, L.J., says, at pp. 145, 146 :

F But it is going far beyond LORD BLACKBURN's dictum to say that because, when an option is given by statute to an authority to do or not to do a thing and it elects to do the thing and does it negligently, it is liable, therefore it is liable if it elects not to do the thing, which by the statute it is not bound to do at all.

G "Because an authority elects to do a thing and does it negligently it is liable," says SCRUTTON, L.J. "An action does lie for doing that which the legislature has authorised if it be done negligently," says LORD BLACKBURN. In each case, however, the words must be read with reference to the matter which was being decided, and the sense in which they were used is illustrated by the passage immediately preceding
 H that which I have quoted from SCRUTTON, L.J., at p. 145 :

LORD BLACKBURN's words are addressed to negligence in the direct operation of the powers conferred and undertaken : for instance if the appellants chose to light by electricity and laid defective wires near to the main gaspipes in their district and so caused an explosion, that would be a negligent exercise of their powers ; or if they placed a refuge in a crowded street and omitted to light it properly, that might be doing negligently that which the legislature authorised.

It is damage caused by negligently doing the act authorised, not damage which is not prevented because the act has not been done, or has not been done efficiently or in time, which is under consideration. If those who are authorised, but not enjoined, to act could be successfully sued for a failure properly to exercise their power, I should have thought it unlikely that they would undertake the permitted task, since to do so would A be to invite an action at the suit of any person who considered that they had not acted with due vigour and care. The result might well be that, in circumstances like those under consideration, action would not be taken where immediate action was necessary. A local authority faced by such a series of disasters as occurred in the present case might B consider that the flooded land was not very valuable, but that they were justified in making an attempt to clear it of water provided the expense was not serious, and think that the expenditure of some small sum would not be too great in an attempt to prevent the damage. In such a case, with their eyes fully open to the possibility of failure, they might C think they were entitled to take a chance of remedying the position with that limited expenditure, but would not feel justified in doing the work in some way which would ensure its success but at a great cost. If the respondents be right, such a decision could never be made safely, since the local authority, by acting, would expose themselves D to the risk of an action for damages at the suit of a third party claiming that, having undertaken the task, the body to whom power had been given must continue with the work until it reached a successful conclusion, though the expense would far exceed the value of the land they would thus have saved. If to undertake the work were to accept the responsibility E for completing it with due care and with reasonable despatch, no prudent authority could safely act at all, except in a case where certainty of success at a limited cost could be guaranteed. I do not say that these were the considerations which influenced the appellants in the present case, but the example given does, I think, illustrate the danger of acceding F to the argument put forward on behalf of the respondents.

I should add that, under the Act in question, if the local body fail to take action in a case where it is thought that they properly ought to do so, there is power for the person aggrieved, under sect. 2 of the Act, to apply to the Secretary of State for an order that they carry out such G work as he instructs them to do. I also desire to make it clear that in what I have said I am not dealing with a case in which it was contended that the authority were estopped from alleging that they were under no obligation to do the work efficiently and with reasonable despatch. No evidence was given, nor was there any plea, that the appellants H by their action had caused either of the respondents to change his position in reliance upon anything which they had said or done. Such a case must wait for decision until facts are alleged and proved such as would create an estoppel. The sole question in the present case is whether the mere undertaking of a task which the legislature has

empowered an authority to do puts them in the same position as if that task had been imposed as a duty upon them. I agree that it does not, and would allow the appeal.

Appeal allowed.

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[*Reported by C. ST. J. NICHOLSON, ESQ., Barrister-at-Law.*]

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